SUPREME COURT, U. S.

SEP 1 1967

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 565

HAROLD FRIEDMAN and JACK JOSEPH,
Petitioners,

vs.

LOUIS WALLACH, MOLLIE WALLACH, His Wife, RICHARD WALLACH, SHIRLEY KASH,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

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INDEX.

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
The questions presented for review	2
Constitutional provisions and statutes involved	3
Statement of the case	3
The manner in which the federal questions sought to be reviewed were raised	4
Reasons for allowance of the writ	5
Appendices:	
A. Judgment of the Supreme Court of Missouri	9
B. Opinion of the Supreme Court of Missouri	10
C. Motion for rehearing	22
D. Order overruling motion for rehearing	30
E. Order of Supreme Court of Missouri staying mandate	31
F. Appellant's (Petitioner's) brief in the Supreme Court of Missouri	32
G. Respondents' brief in the Supreme Court of Missouri	74
H. Appellant's reply brief in the Supreme Court of Missouri	86

Cases Cited.

Central Land Co. v. Laidley, 159 U. S. 103	7
Chase v. U. S. (8 Cir., 1915), 222 Fed. 593, l. c. 596, 138 C. C. A. 117	7

Grannis v. Ordean, 234 U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 1363 6

Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350, reversing 271 N. Y. 564, 3 N. E. 2d 186 .. 5

McGarrity v. Delaware River Bridge Co., 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565 7

Patterson v. Alabama, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082 5

Postal Telegraph and Cable Co. v. City of Newport (1918), 38 S. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215, reversing (1914), 169 S. W. 700, 160 Ky. 244 6

Tracy v. Ginsburg, 205 U. S. 170, l. c. 178 7

Villa v. VanSchaick, 299 U. S. 152, 57 S. Ct. 128, 81 L. Ed. 91 5

Worcester County Trust Co. v. Riley, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268 7

Statutes Cited.

28 U. S. C., 1257 (3) 2

United States Constitution:

Fifth Amendment 3

Fourteenth Amendment 3

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

The Petitioners, Harold Friedman and Jack Joseph, respectfully request a Writ of Certiorari to Division No. 2 of The Supreme Court of Missouri to review a judgment of that court which affirmed, unanimously, a judgment of the Circuit Court of the County of St. Louis, setting aside on a theory of unjust enrichment a deed to real estate from Respondents conveying property to petitioners, wherein the Supreme Court applied the equitable theory of unjust enrichment in a case tried below on a fraud theory.

OPINIONS BELOW.

No formal opinion was rendered by the Circuit Court but its extensive findings and judgment both in the Interlocutory Decree (Record, p. 477 ff) and Final Decree (Record, p. 528) show the Chancellor's theory of the case. (This record was not printed in Missouri and a certified copy is filed here.)

The opinion of The Supreme Court of Missouri (Record, p. 537 ff), is printed as Appendix B herein, and it will be noted that the Petitioners promptly attacked that opinion in The Supreme Court of Missouri in their Motion for Rehearing and to Transfer to the Court En Banc (Record, p. 549 ff) and in paragraphs 4 and 11 of that Motion (Record, p. 555, Appendix C, pp. 22-29) petitioners first therein raised a Federal Question on which this petition is bottomed.

JURISDICTION.

The Judgment of The Supreme Court of Missouri sought to be reviewed was entered May 8th, 1967. A Motion for Rehearing or to Transfer to the Court en Banc was denied June 12th, 1967. The jurisdiction of this Court is invoked under 28 U. S. C., 1257 (3).

THE QUESTIONS PRESENTED FOR REVIEW.

1. Whether a Judgment of a State Supreme Court upsetting a Deed to Real Estate based on a purchase for a valuable consideration in good faith, upon a theory of unjust enrichment of the purchaser and without sufficient evidence, so endangers the stability of land titles as to constitute a taking of property without due process of law, and as to constitute a shock to public conscience, where the theory of the State Supreme Court was not

raised by the parties nor Court below nor briefed on appeal.

2. Whether title to real estate purchased in good faith is a title, privilege or immunity protected by Amendments V and XIV to the Constitution of the United States so that the taking thereof by a Court on a theory **dehors** the pleadings and briefs, is repugnant thereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitutional Provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States.

No Statutes are involved.

The pertinent part of said Fifth Amendment reads as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law."

The pertinent part of the said Fourteenth Amendment reads as follows:

> "Section 1. "* * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor * * *."

STATEMENT OF THE CASE.

Friedman purchased real estate in suburban St. Louis, Missouri, for $69,000.00 from Respondents, Louis Wallach and Mollie Wallach, his wife, putting title in the name of Petitioner Friedman's straw party, Petitioner Jack Joseph, and later on Louis Wallach and his Wife sued for recission on grounds of fraud; before trial, Louis Wallach got into trouble and conveyed the property to his

sister Shirley Kash and brother Richard Wallach, but we will state the facts as involving Harold Friedman and Louis Wallach, the primary moving parties. The conveyance from Louis Wallach to Friedman was drawn by Louis Wallach's attorney who was present at the title company when delivery of the deed was made, and had there been any fraud this lawyer would not have permitted the closing of the deal. Louis Wallach, it is true, was in financial straits and facing foreclosure, and it may be true that Friedman got a bargain; but the theory of unjust enrichment was not pleaded, proved or briefed in the Circuit Court of St. Louis County or in the Supreme Court of Missouri.

The Circuit Court set aside the Warranty Deed for failure of Friedman to finance an allegedly proposed partnership venture of Friedman and Wallach that Friedman had denied under oath in open court; there were no findings to support the element of fraud; and on appeal, the Supreme Court of Missouri failed to base its ruling on either partnership or fraud, but ruled that the conveyance unjustly enriched Friedman.

The testimony was voluminous, as were the briefs below, and we are printing those briefs as Appendices hereto, so that this Court may see by the process of elimination that **unjust enrichment** was not briefed below.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The questions as to whether the Supreme Court of Missouri denied Petitioners due process of law by taking property from them in the manner it did, was raised in that Court by Motion for Rehearing as heretofore set out, that motion (see Appendix C, herein), reading in its paragraphs 4 and 11, as follows:

"4. This Court did not discuss the fact that the Court below undoubtedly erred in not declaring a mistrial on its own motion when defendants' exhibits disappeared from the court room during the trial. The action of the lower court in proceeding with a trial with knowledge that defendants' exhibits had disappeared under suspicious circumstances (to say the least!) denied appellants due process of law under Amendments V and XIV of the Constitution of the United States." (Record, p. 552; cf., Record, pp. 193, 379, 386.)

"11. The Due Process clauses of the Constitution of the United States were not pleaded below, but we feel very strongly that public policy forbids upsetting a warranty deed, given in good faith, both parties being represented by counsel when it was delivered. To upset such lightly would endanger the stability of all land titles. We urge most vehemently that the judgment of the court below and the opinion of this Court take Appellants' property without due process of law, in violation of Amendments V and XIV of said Constitution." (Record, p. 555.)

REASONS FOR ALLOWANCE OF THE WRIT.

The Record in this case (p. 558) shows that the Petitioners' Motion for Rehearing or to Transfer to the Court en Banc, was overruled. No opinion was filed at that time passing on the Federal question raised in that Motion. The law is well settled in this Court that where the record on appeal is silent as to a State Court's disposition of the Federal question raised, this Court will grant Certiorari and Reverse and Remand the case for such details; Villa v. VanSchaick, 299 U. S. 152, 57 S. Ct. 128, 81 L. Ed. 91; Patterson v. Alabama, 294 U. S. 600, 607, 55 S. Ct. 575, 578, 79 L. Ed. 1082; Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476, 57 S. Ct. 350, reversing 271 N. Y. 564, 3 N. E. 2d 186; and in Grannis v. Ordean, 234

U. S. 385, 58 L. Ed. 1363, 34 S. Ct. 1363, it was held that where a Federal question is first raised in a Motion for Rehearing in a State Supreme Court, this Court can take jurisdiction on Certiorari.

The case in this Court closest to the case at bar is Postal Telegraph and Cable Co. v. City of Newport (1918), 38 S. Ct. 566, 247 U. S. 464, 62 L. Ed. 1215, reversing (1914), 169 S. W. 700, 160 Ky. 244, wherein it was held that where a State Court decides a question wholly on State law, the Supreme Court will review if Federal law is in anywise involved, and will reverse the case where the conclusion of the Court below "is so clearly unfounded that it cannot sustain the judgment"; and, further, that "The opportunity to be heard is an essential requisite of due process in judicial proceedings"; 247 U. S., l. c. 476; and a State may not, consistently with the 14th Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard; loc. cit. 476; and we submit this doctrine makes it error for a Court on appeal to enforce a doctrine that was not pleaded, proved, briefed or argued below.

The Supreme Court of Missouri erred when it went outside the record to decide this case on a theory of unjust enrichment and wrote (Record, p. 546, this book, Appendix **B**, page 20),

> "We hold that, under the clear, cogent and convincing evidence in this case, the defendants, if permitted to retain title to or interest in the real estate, would be unjustly enriched, and that a constructive trust should be imposed in plaintiffs' favor. Restatement, Restitution, § 160; Musser v. General Realty Co., supra; Suhre v. Busch, 343 Mo. 679, 123 S. W. 2d 8; Swon v. Huddleston, Mo. Sup., 282 S. W. 2d 18, 25, 26."

We purposely refrain from discussing here the post-judgment writs of execution and other wrongs that will fall automatically when the case is herein reversed. There will be another way to have these things made right later. Not even an Act of Congress is Due Process of Law if it takes from a party a vested title to real estate, Chase v. U. S. (8 Cir., 1915), 222 Fed. 593, l. c. 596, 138 C. C. A. 117, and we fail to see how an off-beat Court Opinion abandoning the theories of both parties to the case could be any stronger. For this same reason we feel that this case is such a gross miscarriage of justice as not to be within the doctrine that ordinarily an adverse decision of a State Court, based on State law, litigated and contested, is not a denial of Due Process of Law; Worcester County Trust Co. v. Riley, 58 S. Ct. 185, 302 U. S. 292, 82 L. Ed. 268; Central Land Co. v. Laidley, 159 U. S. 103; Tracy v. Ginsburg, 205 U. S. 170, l. c. 178, last two sentences.

The exact proposition we raise has not been passed on by this Court and should be herein settled.

This case is not within the rule of McGarrity v. Delaware River Bridge Co., 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565, where this Court had no copy of the record below. Missouri does not require the record to be printed and we are filing only one copy, but it is here.

The question we raise is substantial. Heretofore this Court has had many cases deciding whether or not particular State **statutes** violate the concept of "Due Process of Law," but we think this is a case never before decided in this Court, **whether or not an opinion of a State Supreme Court** is so diabolical in its approach to a case as to be a denial of due process of law. "Due Process" is usually thought of as synonymous with "Court Process" or "Court Trial". Bouvier defines it as "Law in its regular course of administration through courts of jus-

tice." We submit that regular course of administration contemplates an opportunity to present full evidence and briefs on every issue presented. If a State Supreme Court can, in a civil case, abandon a fraud theory and dispossess a landowner on some conception of "unjust enrichment," why could it not hold that evidence of rape being insufficient, some poor prisoner is guilty of automobile theft? If a Court can do what it did here, where must it stop? Is it not time for this Court to issue Certiorari here and in a hearing on the merits, determine once and for all how far an Appellate Court can go outside the pleadings and evidence in a lawsuit, dehors the briefs, and enter a star chamber judgment based on something as nebulous and non-existent as the fictional Kangaroo Courts of literature? We think jurisdiction should be accepted.

For the reasons outlined, it is submitted that the questions presented are substantial, and that this Petition for a Writ of Certiorari should be granted and that a plenary consideration of the issues is warranted.

Respectfully submitted,

DAVID K. BREED,
Attorney for Petitioners.

APPENDIX

APPENDIX "A".

Judgment of the Supreme Court of Missouri.

And Thereafter the following proceedings were had and entered of record in said cause on the 8th day of May, 1967, to-wit:

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Respondents,

51,513. vs. Appeal from the Circuit Court of St. Louis County.

Jack Joseph and Harold Friedman, Appellants.

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of St. Louis County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed.)

And Thereafter on the 8th day of May, 1967, the opinion of Division No. Two was filed, which opinion is in words and figures as follows:

APPENDIX "B".

Opinion of the Supreme Court of Missouri.

In the
Supreme Court of Missouri,
Division Number Two.

April Session, 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Respondents, vs. Jack Joseph and Harold Friedman, Appellants.	No. 51,513.

Appeal from the Circuit Court of St. Louis County,
Division No. 1,
Honorable George E. Schaaf, Judge.

This is a suit in equity involving title to real estate located on Lucas and Hunt Road in St. Louis County, Missouri.

On January 16, 1961, plaintiffs Louis Wallach and Mollie Wallach signed a Receipt for Earnest Money, which acknowledged receipt of the sum of $7,100 from defendant Harold Friedman as earnest money and part payment on purchase of the real estate, "which property is this day

sold to Harold Friedman, his successors or assigns for the total sum of Sixty-nine Thousand and no/100 ($69,000.00) Dollars." On March 9, 1961, Plaintiffs Louis Wallach and Mollie Wallach signed a Warranty Deed naming defendant Jack Joseph as grantee. At the time these documents were executed, the real estate was incumbered by a first deed of trust and a second deed of trust. On November 20, 1962, Louis Wallach and Mollie Wallach conveyed by quit-claim deed to plaintiff Shirley Kash as straw party for plaintiff Richard Wallach. Shirley Kash is a sister of Louis and Richard Wallach.

Plaintiffs brought this suit against defendants to determine title, to reform or set aside the instruments dated January 16, 1961, and March 9, 1961, and to cancel defendants' asserted interests in the real estate. The trial court decreed Richard Wallach to be the owner in fee simple of the real estate and found defendants have no title or interest therein. The trial court in its decree gave defendant Harold Friedman credit for payments and improvements made by him, restoring the parties to their original positions. Defendants appealed to this Court.

The facts are complicated and we shall recite only those which bear on the issues raised on appeal. Prior to the transaction in question, title to the real estate was in Louis Wallach and Mollie Wallach. In January, 1961, Louis Wallach, who operated a salvage yard on the premises, found himself in financial trouble. He was in default on the first deed of trust. Friedman came to see Louis Wallach and they discussed a disposition of the real estate.

According to Louis Wallach, they entered into an oral agreement whereby Friedman was to pay $2,737.14 to avoid foreclosure on the first deed of trust, pay in full an indebtedness of $10,000 secured by the second deed of trust, and advance $10,000 for working capital. He testified that a corporation was to be formed to take title to

the real estate, with each owning one-half of the capital stock.

According to Friedman, no such oral agreement existed. He testified that there was no agreement for the formation of a corporation to be equally owned by the parties, and that the transaction was an outright sale as evidenced by the Receipt for Earnest Money and Warranty Deed.

There is an irreconcilable conflict in the evidence as between Louis Wallach and Harold Friedman. Therefore, the testimony of William J. Becker, a practicing attorney in Clayton, Missouri, is important. His testimony on direct examination, in part, is as follows: "Q. Did you ever have occasion to meet with Mr. Louis Wallach and Mr. Harold Friedman in connection with this transaction? A. Yes, sir. * * * Q. Will you tell us what matters were discussed in your office at that time? * * * A. Wallach I believe was there first waiting and then Mr. Friedman came in and my recollection is that he had with him an earnest money agreement dated that day, no, I take that back, that was prepared at least in part in my office and they stated that because Mr. Wallach was unable to raise the necessary payment to meet the first mortgage payment at the time and the taxes were delinquent and there was a, one judgment that was a lien on the property outstanding and Wallach run out of cash, operating capital, that he had entered into an agreement with Mr. Friedman whereby they would become partners in this used car parts business or salvage business as it is so-called and that they would transfer the property to a corporation to be formed by them, that Mr. Friedman would furnish the necessary money to pay off or pay up the current taxes and he would make the payment that was now due to the heirs of the estate that held the first mortgage and various other payments which were later reflected in writing which I have here and Lou who put

in his equity in the property. Now, they estimated that what Mr. Wallach—Mr. Friedman would have to pay up would be about $7100.00 or thereabouts and there was $48,000.00 on the first and $10,000.00 on the second. Now, this was an estimated amount on the second and the first was estimated at $48,000 at that time pretty close. Mr. Friedman insisted that he had to have an earnest money contract in order to make the bank, that the State Bank of Wellston or better, people associated with the State Bank of Wellston who owned the second, the bank didn't own it, I believe called Bond Investment Company controlled by some of the officers of the State Bank of Wellston owned this second and he had to make them believe that he was buying the property in order to, for him to be in a position to settle that second for $10,000.00. Q. Where did you get that information, from whom? A. From Mr. Friedman, he told me this in very plain unmistakable language. * * * Q. Did they discuss just how much money, if any, that Mr. Friedman was to put up in connection with this business enterprise? A. Well, that day, Mr. Friedman put up $2737.14 which was delivered to Mr. Obrock for the benefit of the holder of the deed of trust and for the payment of the taxes. A.* That was to stop foreclosure to be held that day? A. Yes, sir, to be held that day and $2281.90 was to cover the foreclosure and $425.00 to cover the back taxes. Q. When they were in your office before you went over to the Title Insurance Corporation office to deliver the money to stop the foreclosure, did they tell you that there had been any definite agreement as to just exactly how much money Mr. Friedman was to put up into the business? A. Not in addition to these payments that were necessary to clear up the property so that it would be clear of everything but the first and the first would be current, taxes would be currently paid in addition to that one of them said and the

* So in original, should be "Q."

other, whichever one said it, the other didn't deny it, that Mr. Friedman was to put in $10,000.00 operating cash into this corporation. I am sure now that I am thinking of it, I am sure it was Mr. Friedman that, he insisted that is what he was going to have to do to make this work. * * * Q. Was there anything said about it on January 16 While Friedman and Mr. Lou Wallach were in your office about what was to be done with respect to the second deed of trust on the property? A. Mr. Friedman was to pay that off. Q. And the property, did they discuss the property to be put in a corporation? A. I stated before that that was what they planned to do and each would get half of the stock of the corporation and I was to form the corporation for them. * * * Q. I show you Plaintiffs' Exhibit 32 which is your copy, office copy of the earnest money and receipt, there is a consideration inserted there, $69,000.00, you know whether that was inserted by you in the office or was that already in there? A. That $69,000.00 is obviously on the typewriter of my office and it was, if I recall, figured up this way; first deed of trust, $48,000.00, second deed of trust, let us say for the time being, $10,000.00, that would give you $58,000.00. The Stockhammer judgment $1000.00, that would give you $59,000.00 and the $10,000.00 cash to be put in for the corporation of the business, that is roughly it. They arrived at that quick in my office that morning. Q. And that is how they arrived at the figure to your knowledge of $69,000.00? A. Only purpose of showing the bank. * * * Q. Now, do you have any independent recollection of what occurred on the 9th of March, 1961? A. Yes, sir. We met again. My recollection is that it was in the title company office and it was not until we got over there that —you see, there were other details of this agreement to be carried out before the corporation could be formed or the property deeded to the corporation to be formed. There were other moneys to be paid. Now, at that time we prepared another closing statement and my recollection

is that it was signed and approved by both Mr. Wallach and Mr. Friedman and each took his signed copy. * * * Q. Was there anything said at that meeting on March 9, 1961 about this corporation that was to be formed? A. Yes, sir. Q. Do you recall what was said then? A. That as soon as they could work out the details they would form the corporation. Q. Now, was there a deed prepared at that time to this property? A. Yes, sir. * * * Q. Do you recall when it was signed in your office; on that date was Mrs. Mollie Wallach present? A. She came in to sign it I believe the day before. Q. Was the deed complete in all respects? A. Yes, sir. Q. Was the name of Jack Joseph in the deed, do you recall? A. No, not when she signed it, because we didn't know his name at that time. Q. Do you know when the name of Jack Joseph was inserted in the deed? A. It was inserted in the deed. Q. Was that done in your office? A. In my office on the same typewriter later in the day after Mr. Lou Wallach and Mr. Harold Friedman agreed on Jack Joseph as a straw party. Q. Did they discuss that in your presence? A. Yes, sir. Q. What did they say about Mr. Joseph being a straw party, if anything. A. I suggested that we should leave the deed either with Mr. Obrock or someone else and later put the corporation name in it when the corporation was formed, that would probably be the most convenient way to do it, but Mr. Friedman suggested he thought that unless he could get this in his name he didn't think he would have any luck with the holder of the second to settle that for that $10,000.00 figure and he would have to have it in someone's name that he and Lou discussed and I said, well, now, do you want it in your name and give us a private receipt for it which I would have described the whole deal and he said no, he didn't want it in his name. I didn't press for reason on that. Q. And who suggested the name of Joseph, do you know? A. Mr. Friedman did. Q. And he said that he was to act as straw party, is that

my understanding? A. No, he asked if Joseph would be all right and Lou Wallach said yes, I know him well. Q. They weren't conveying this property to Mr. Joseph because he was to be the real owner, were they? A. The two of them in my presence, he would be a man who they would both trust to hold the title until the corporation could be formed in the meantime that Mr. Friedman would pay off the second. Mr. Friedman was the man who would be paying the second back rather than Lou Wallach. * * * Q. And then would you have anything to do with the deed after it was signed up and Joseph's name was put in there? A. I don't know whether the title company man recorded it or Mr. Friedman recorded it. I did not. Q. But it was agreed that it would be recorded? A. Yes, sir. Q. And Mr. Joseph later on would give a deed to the corporation? A. That was the understanding and both men trusted him to that extent. * * * Q. When was the next occasion that you had any meetings with the parties if you did have a meeting? A. Well, I think that I had a number of conversations with Mr. Friedman in the meantime and with Mr. Lou Wallach in the meantime about this matter and the corporation was not formed. The judgment was not satisfied. The note was not paid and the business agreement was never consummated. The whole matter was as we left it on the 9th of March, in the terminology of the lawyer, is what we call non-consummata, is nothing happened after that. * * * Q. When you talked to Mr. Friedman what was the general nature of your discussion? A. Well, first of all, when he was going to get around to tell me what he wanted in the way of a corporation, whose name on the stock and how much par value and the details about it. I never could get him to, neither could Mr. Lou Wallach. * * * Q. I believe there was a time sometime in November of 1962 when the property was again being advertised for sale under foreclosure and I believe Mr. Lou Wallach arranged with his brother to put up the necessary funds to

take it over, were you present on that occasion? A. I think that you negotiated on behalf of Richard Wallach in my office with me and with Lou. Q. And Mr. Richard Wallach did agree to put up the money to stop the foreclosure and upon condition that Mr. Louis Wallach deed the property over to him? A. No, that was one of those, what I call a walking deed, you know, he gave him a deed all right but it wasn't to be good unless Lou Wallach failed to pay the money back at a certain time. Q. Did he ever pay the money back? A. I don't know this. * * * Q. Mr. Becker, at the time this earnest money contract was signed by Mr. Wallach and his wife and Mr. Friedman on January 16, 1961 and when this closing statement was prepared, did any of the parties ever tell you there was to be an actual sale of the property? A. No, I made that plain. They told me this was an arrangement whereby they would both get into business together as partners."

On cross-examination, Becker testified, in part, as follows: "Q. Now then, then Bill, did you discuss with Mr. Friedman the formation of that corporation? A. Yes, sir. Q. Now, was that sometime after March the 9th or was it prior? A. On March 9 before we left my office it was my thought that I would make a deed to Friedman to this property which would be signed by Lou and Mollie Wallach and take back from Friedman a receipt outlining all of the terms of this proposed partnership agreement to be put in the form of a corporation. I so stated to them, then Friedman said, no, we can't do it that way and I didn't press it. I got to put for the time being in the straw party's name. I don't want that property to be in my personal name in the interim. Then I said, well, who is your straw party and after some hesitating and I didn't think he would know right off hand and he said, how about Jack Joseph and he looked at Lou, I know him, that's all right with me, Lou said. * * * Q. Nothing

abnormal about this transaction at all, was there? A. Nothing. * * * Q. (By Mr. Moore) This quit claim deed from Mollie Wallach and Lou Wallach to Shirley Kash, that's the one that I was talking about? A. Yes, sir. * * * Q. On the 20th of November, 1962. A. That would be the date, yes, sir. Q. Now, Mr. Becker, was there any reason for preparation of this deed and the assignment of Lou Wallach's interest to his sister and the brother? A. Of course. Q. What was that? A. First of all that Richard paid the then due payment on the first deed of trust to save it from foreclosure, and second of all, there was this agreement and assignment between that that outlines the consideration, and third, they were brothers, weren't they? A. Yes. A. That's it. * * * A. As to feelings, I don't believe there was any anger between Lou Wallach on the one hand and Harold Friedman on the other until the day we filed this suit as to when Lou Wallach became aware of the fact that this thing wasn't going right. I don't know, but I know that when Mr. Friedman had not paid the Stockhammer judgment and had not paid off the second within two weeks after March 9, then I personally began to look upon the whole transaction with some degree of circumspection. Q. What's that mean? A. I began to have my doubts about the good intention of your client."

There are two points raised on appeal which were preserved in defendants' motion for new trial: (1) that the trial court erred, under the evidence, in granting equitable relief to plaintiffs; and (2) that the trial court erred in not finding that plaintiffs have an adequate and complete remedy at law.

The issue actually involved here is whether plaintiffs are entitled to be relieved of the legal effect of the earnest money contract and warranty deed on the ground they were induced to execute them because of false representations made by Harold Friedman.

We first recognize that when persons sign a contract and deed they are presumed to know their contents, to have accepted their terms, and that all prior negotiations are merged into the written instruments. However, when there is fraud in the inducement, we give relief and place the parties in status quo. The fraud may be proved by parol evidence. Judd v. Walker, 215 Mo. 312, 114 S. W. 979; Jackson v. Tibbling, Mo. Sup., 310 S. W. 2d 909. It is also well settled that fraud may be inferred from facts and circumstances and need not be shown by direct evidence. Black v. Epstein, 221 Mo. 286, 120 S. W. 754; Castorina v. Herrmann, 340 Mo. 1026, 104 S. W. 2d 297.

In State ex rel. Taylor v. Anderson et al., 363 Mo. 884, 893, 254 S. W. 2d 609 at 615, appears a statement particularly appropriate here: "This being a suit in equity, we review the case de novo, weigh the evidence, and determine on the whole record what relief, if any, should be granted. Where, as here, however, there exists an irreconcilable conflict in the evidence on the essential fact issue involved, depending for determination on the credibility of witnesses, a situation prevails wherein the application of the rule of deference to the findings and conclusions of the trial chancellor is especially appropriate and necessary [Citing cases]. The trial chancellor's opportunity to observe the witnesses and to hear them testify affords him a basis for determining the credibility of testimony which we do not have. A review of the entire record in this case convinces us we should defer to the trial court's conclusion that the testimony of * * * [Louis Wallach and William J. Becker] was true." In our opinion, the oral agreement testified to by Louis Wallach and William J. Becker is established by clear, cogent and convincing evidence.

This Court has recognized that in equity a **state of mind** may be misrepresented and that this constitutes a misrepresentation of fact upon which actionable fraud may

be based giving rise to a constructive trust. Thieman v. Thieman, Mo. Sup., 218 S. W. 2d 580; Musser v. General Realty Company, Mo. Sup., 313 S. W. 2d 5. It is conceded that defendants refuse to comply with the oral agreement and to recognize plaintiffs' interests therein. The evidence is sufficient to show that Harold Friedman did not intend to perform the agreement when he made it. We believe that the oral agreement by inducement procured the execution of the earnest money contract and the conveyance by deed, constituted a "misrepresentation of the fact of * * * [Friedman's] intention at the time the agreement was made," and justifies the imposition of a constructive trust as to Harold Friedman. Musser v. General Realty Co., supra, 313 S. W. 2d 5, 10; Restatement, Restitution, § 166. We are of the opinion that, as to plaintiffs, Jack Joseph was a straw party in the transaction, "one of no substance, one in name only." Houtz v. Hellman, 228 Mo. 655, 669, 128 S. W. 1001, 1005. In any event, under the evidence, he must be charged as a constructive trustee of the property because the execution of the deed was induced by the fraud of Harold Friedman. Restatement, Restitution, § 167; Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 289, 290, 94 S. W. 527, 536.

We hold that, under the clear, cogent and convincing evidence in this case, the defendants, if permitted to retain title to or interest in the real estate, would be unjustly enriched, and that a constructive trust should be imposed in plaintiffs' favor. Restatement, Restitution, § 160; Musser v. General Realty Co., supra; Suhre v. Busch, 343 Mo. 679, 123 S. W. 2d 8; Swon v. Huddleston, Mo. Sup., 282 S. W. 2d 18, 25, 26.

There being fraud in this transaction giving rise to a constructive trust, plaintiffs may not be denied equitable relief on the basis that they have an adequate and complete remedy at law. "* * * The right claimed and the

relief sought is the subject of original equity jurisdiction, and the case as stated could be determined on its merits only in a court of equity. The court below was right in entertaining the case regardless of whether there was or was not a remedy at law. This being true, it is not necessary to either discuss or determine whether plaintiff did or did not have a remedy at law. * * *." Ellenburg v. Edward K. Love Realty Co., 332 Mo. 766, 774, 59 S. W. 2d 625, 628; Stewart v. Caldwell, 54 Mo. 536, 539.

This Court, sitting in equity, de novo, must administer complete justice within the scope of the pleadings and evidence, even though plaintiffs have mistaken the specific relief to which they are entitled. The "doctrine is too well settled to admit of either discussion or dispute, that when a court of equity once acquires jurisdiction of a cause it will not relax its grasp upon the *res* until it shall have avoided a multiplicity of suits by doing full, adequate and complete justice between the parties." Real Estate Sav. Inst. v. Collonious, 63 Mo. 290, 295. Plaintiffs are entitled to equitable relief. Sayer v. Devore, 99 Mo. 437, 477, 13 S. W. 201, 204.

The judgment of the trial court is for the right parties, and it is affirmed.

Robert T. Donnelly, Judge.

All of the Judges Concur.

APPENDIX "C".

Motion for Rehearing.

In the
Supreme Court of Missouri.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 51,513, Division No 2.

On Appeal to the Supreme Court of Missouri from the Circuit Court of St. Louis County, Division No. 1, The Honorable George E. Schaaf, Judge.

Appellants' Motion for Rehearing and to Transfer to Court En Banc.

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In the
Supreme Court of Missouri,
Division Two.

April Session, 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash, and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 51,513.

On Appeal to the Supreme Court of Missouri from the Circuit Court of St. Louis County, Division No. 1, Honorable George E. Schaaf, Judge.

Appellants' Motion for Rehearing and to Transfer to the Court En Banc.

Come now the Appellants herein, by their attorney, and respectfully move this Honorable Court to withdraw the opinion filed herein on May 8th, 1967 and to grant a rehearing herein and to transfer this Cause to the Court en Banc, and for grounds of said motion and suggestions in support thereof state as follows:

1. That this Court took a one-sided view of the testimony of William J. Becker, favoring his clients, Respondents, and overlooked Mr. Becker's admission (Tr. p. 241) that the sale and conveyance of the real estate to Appellants was "a perfectly normal transaction." We

realize that sometimes innocent conduct gives rise to **constructive** fraud but the cases cited in the Court's Opinion (p. 9) as to a **state of mind** giving rise to actionable fraud (Thieman v. Thieman, Mo. Sup., 218 S. W. 2d 580), are in conflict with the opinion in Division One of this Court in Lowther v. Hayes, 225 S. W. 2d 708, l. c. 714, and the Court en banc should be given an opportunity to resolve the conflict.

2. Testimony in Court by Counsel, according to the Canons of Ethics, should be indulged in but sparingly and we wonder whether both the Circuit Court and this Court did not go too far in following the **willing** testimony of Mr. Becker against the **clear, cogent evidence** of the written exhibits. See, Appellant's Brief, page 13 point 4, and several exhibits discussed in Appellant's Brief, pp. 8 and 9. We feel very strongly that where, as here, the Court's opinion fails to mention our theory of the case or the strength of plaintiff's own exhibits in defendant's favor, the Court en banc should review the case.

3. This Court, like the Court below, failed to give proper consideration to the fact that the purchaser was granted an extension of time to close the deal. If Mr. Becker's testimony were true, and If the conveyance were only for the convenience of all parties, and If the sale was not bona-fide, Why did appellant insist on an extension of time to close the deal, and obtain the initials of Louis Wallach and Mollie Wallach, his wife, on the extension clause on Respondent's Exhibit 14? Why did Appellant write in in long hand that all other terms of the Earnest Money Contract remain in force? Under the law, plaintiffs-respondents are bound by their own evidence and are bound by their own plaintiffs' Exhibit 14, which is the said Earnest Money Contract. This exhibit was and is clear, cogent, and convincing, undisputed Respondent's evidence in favor of Appellant.

4. This Court did not discuss the fact that the Court below undoubtedly erred in not declaring a mistrial on its own motion when defendants' exhibits disappeared from the court room during the trial. The action of the lower court in proceeding with a trial with knowledge that the defendants exhibits had disappeared under suspicious circumstances (to say the least!) denied appellants due process of law under Amendments V and XIV of The Constitution of the United States.

5. Newly **discovered** evidence, even at this point in the proceeding, would be grounds for a new trial under some circumstances; and we submit that the same rule should apply to newly **available** evidence. Martin Kopolow was mentioned (Tr. 316) but did not appear although it was his child after whom Lou Wallach named his business, Harlan Salvage Co., at one time (Appellant's Brief, 18); Leroy Kopolow, Esq., Harold Friedman's attorney at the closing of the sales deal in Mr. Becker's office, likewise was not called; nor did the Court below hear from Mayor Hayes as to the meeting of minds, nor from title official Mr. O'Brock as to what took place at the closing. These unused witnesses were all mentioned at the trial (Tr. pp. 24, 27, 28, 33 last answer, 71, 357 last line, 329, 316). Mr. Becker representing Respondents, Mr. Leroy Kopolow representing Appellants, Mr. Obrock the title man, and the parties were present at the closing (Tr. p. 329) and if this had not been a routine deal, why were both sides represented by counsel?

6. This Court decides this case largely on a theory of "unjust enrichment" which, we admit, is a valid theory in a proper case. **But** it is misapplied to the facts here. It is true that the Admiralty theory of prize in the case of a sinking ship is not often brought up as an analogy in real estate title cases; but this court clearly finds (Opinion, page 2), that Louis Wallach was in financial

difficulty. Mr. Friedman saved the property and paid for an equity. What recompense does the opinion give Mr. Friedman for the rescue?

7. Again, on page 8 of the opinion, this Honorable Court quotes Mr. Becker as testifying that, some two weeks after the deal was closed, he began to look upon the transaction "with some degree of circumspection. Q. What's that mean? A. I began to have my doubts about the good intention of your client" (Tr. p. 254). We know of no Court decision holding "circumspection" or "doubts" to be "fraud",—actual, imputed or constructive!

8. Louis Wallach and Harold Friedman are both serving time in the Missouri State Penitentiary under sentences affirmed by this Court; State v. Wallach, 389 S. W. 2d 7; State v. Friedman, ... S. W. 2d ..., Case No. 51954 decided February 13th, 1967 and not yet reported; and neither one has earning power now. When they shall be released, this valuable property, ever increasing in value, will give a livelihood to whomever the Court rules for; and this Court should consider that the doctrine of unjust enrichment in equity works both ways. Neither Judge Schaaf nor the parties mentioned the doctrine. It has not been briefed by either party. The short time given us to file this motion does not permit of extensive briefing. But, Respondents ought not to be unjustly enriched at appellants' expense, any more than appellants should be unjustly enriched at Respondents' expense, and we respectfully submit that If this Court continues herein to affirm the Court below, restitution to Appellants should be at least $25,363.64 (Appellants' Brief, pp. 38, 39), and not the sum of $6,892.95 allowed by the Court below. Frontage on Lucas and Hunt Road in St. Louis County, Missouri, is highly valuable. It has increased since this litigation has been pending. This Court should not con-

fuse restitution with unjust enrichment, nor lightly pass over the question of adequate restitution.

9. Before this case was argued, Appellant herein was somewhat worried that State v. Friedman, Supra, was pending at the same time, before the same Judges and Commissioners, in the same Division of this Honorable Court; cf., file No. 51954 in this Court; and that sometimes subconscious, involuntary human memory (weakness?) can influence a case, but State v. Wallach is older and not so recently in the memory of the Judges. The Court en banc here would have less chance of subconscious memory. Present counsel even thought about seeking a change of venue in this Court but could find no authority for it. The same Bench sat in both cases. (Cf., Paragraph 12, infra, where we argue this question from a different angle!)

10. This Court in its opinion does not discuss the position of Respondents in the light of the age-old Maxim that "He who comes into Equity must come with clean hands". The writer did not try the case below and can not enlarge on the record (Tr., pp. 193-195), as to a fracas over **stolen exhibits**; but we feel that there must have been anger between the parties notwithstanding the testimony of Mr. William Becker quoted in the Court's opinion; and we can only surmise that this lawsuit was born of spite. We feel that this Court has reached the wrong conclusion and should vacate the opinion and grant a new trial, and an opportunity to search for stolen exhibits!

11. The Due Process clauses of the Constitution of the United States were not pleaded below, but we feel very strongly that public policy forbids upsetting a warranty deed, given in good faith, both parties being represented by counsel when it was delivered. To upset such lightly would endanger the stability of all land titles. We urge

most vehemently that the judgment of the court below and the opinion of this Court take Appellants' property without due process of law, in violation of Amendments V and XIV of said Constitution.

12. We did not emphasize in our argument but now feel it is very important to show that this case was never heard below on the merits. It was heard in part on November 19, 20, and 21, 1963, and an interlocutory or preliminary Decree entered December 17th, 1963 (Tr. p. 477); when it had been stipulated at the close of the evidence (Tr. p. 476), that the hearing had up to that point on a temporary restraining order be treated as a hearing "on the merits". On December 17th, 1963, instead of handing down a final decree on the merits, the Court made an Interlocutory Order and let the matter hang until 14 more months went by. The Interlocutory Decree was not appealable, but in the last analysis it fixed the rights of the parties, and really denied Appellants any prompt Appellate relief. We reiterate, the Interlocutory Decree was entered on December 17th, 1963 (after the case had been submitted on the merits). Appellant Friedman was not arrested in State v. Friedman until March or April, 1964. Prompt appeal in the case at bar (had the 1963 Decree been final), would have permitted decision here before the trial in the criminal case. Delay by the trial court until the final decree of March 24, 1965, took it past Appellant Friedman's arrest in April, 1964, and gave rise to contemporaneous docketing here, and any subconscious prejudice in the case at bar. Such delay was error. It is our recollection that there are cases holding the entry of an interlocutory decree (non-appealable), when an appealable final decree could have been entered at the time, creates a condition of confusion and jeopardy and is reversible error; but we can not find the citation.

Conclusion.

The Judgment of the trial Court is for the wrong parties and should be reversed. The opinion of The Supreme Court likewise has reached a wrong conclusion and should be withdrawn. A rehearing should be granted either in this Division or, preferably, before the Court en banc.

Respectfully submitted,

David K. Breed,

Attorney for Defendants-Appellants.

APPENDIX D.

Order Overruling Motion for Rehearing.

And Thereafter the following proceedings were had and entered of record in this cause on the 12th day of June, 1967, to-wit:

Louis Wallach et al.,

Respondents,

51513 vs.

Jack Joseph et al.,

Appellants.

Now at this day the Court having seen and fully considered the motion of the appellants for a rehearing or in the alternative to transfer the above entitled cause to the Count en banc, doth order that said motion be and the same is hereby overruled.

APPENDIX E.

Order of Supreme Court of Missouri Staying Mandate.

And Thereafter the following proceedings were had and entered of record in this cause on the 22nd day of June, 1967, to-wit:

Louis Wallach et al.,

Respondents,

51513 vs.

Jack Joseph et al.,

Appellants.

Now at this day the Court having seen and fully considered the motion of the appellants to stay the mandate in the above entitled cause, doth order that said motion be and the same is hereby sustained and the mandate ordered stayed for a period of ninety days from this date.

APPENDIX "F".

Appellant's (Petitioner's) Brief in the Supreme Court of Missouri.

In the
Supreme Court of Missouri.

January Call, 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 245,269. (St. Louis County) No. 51,513. (Supreme Court of Missouri)

On Appeal to the Supreme Court of Missouri from the Circuit Court of St. Louis County, Division No. 1, Honorable George E. Schaaf, Judge.

Appellant's Statement, Brief and Argument.

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Index.

	Page
Jurisdiction	37
The Pleadings	38
The Judgment	39
Procedure	40
Plaintiffs' Testimony	40
Earl Smith	40
Louis Wallach	41
Victor Hallauer	44
William J. Becker	44
Joseph Becker	46
Richard Wallach	46
Turuche Lorretz	47
Richard Wallach—recalled	48
Louis Wallach—recalled	48
Defendants' Testimony	49
Harold Friedman	49
Harold Friedman—Cross-Examination	50
Jack Joseph—Direct and Redirect	52
Harold Friedman—Cross-Examination	52
Peter Joseph McDermott—Cross and Redirect	53
Mr. Beggiano	53
Rebuttal Testimony	
Louis Wallach	53
Interlocutory Decree	54
Time Lapse	54

Supplemental Evidence (Nov. 6, and 27, 1964) 54
By Plaintiffs—Harold Grober, Harold Friedman and Stephen A. Boggiano 54
By Defendants—Anthony Vaccaro 55

Final Decree 55

Motion for New Trial or Rehearing 56

Assignment of Errors 57

Points and Authorities 58

Argument 61
Deference to Court Below 61
Louis Wallach 64
Elements of Fraud 65
Evidence to Cancel a Deed Must Be Clear, Cogent and Convincing 66
Value of Improvements 67
Rents Awarded Plaintiffs 68
Oral Motion to Dismiss 69
Plaintiffs did not come into equity with clean hands 69
Defendants' Plea to Quiet Title should have been granted 70

Conclusion 71

Appendix—Notice of Lis Pendens 72

Cases

Per Hyde, C., in Fessler vs. Fessler, 60 S. W. (2nd) 17, l. c. p. 23 58
Kingston vs. Mitchell, 117 S. W. (2nd) 226, l. c. 229 .....59, 61
Cornet vs. Bertelsmann, 61 Mo. 118 .....59, 61

Farmers' Bank of Higginsville vs. Handly, 9 S. W. (2nd) 881 .....59, 61
Gross vs. Byler, 297 S. W. 391, 397 .....59, 62
State vs. Wallach, 389 S. W. (2nd) 7 .....59, 65
Maupin vs. Provident Life & Accident Ins. Co., 75 S. W. (2nd) 593 .....59, 65
Langley vs. Imperial Coal Co., 138 S. W. (2nd) 696, 234 Mo. App. 1087 .....59, 66
Lowther vs. Hays, 225 S. W. (2nd) 708 .....59, 66
Batson vs. Peters, 89 S. W. (2nd) 46 59
Barlow vs. Scott, 85 S. W. (2nd) 504 59
Picket vs. Repple, 114 S. W. (2nd) 999, 342 Mo. 274 . 59
Shaw vs. Hamilton, 141 S. W. 2nd 817, 346 Mo. 366 59
Mizell vs. Osmon, 189 S. W. 2d 306, 354 Mo. 321 60
Hinton vs. Powers, 38 Mo. 353 .....60, 68
Hope vs. Blair, 16 S. W. 595, 105 Mo. 85, 24 Am. St. Rep. 366 .....60, 70
Missouri State Life Ins. Co. vs. Russ, 214 S. W. 860 .....60, 70
Staub vs. Phillips, 271 S. W. 365 67
Woolum vs. Tarpley, 196 S. W. 1127 .....60, 70
Miller vs. Heisler, 187 S. W. 2d 485, transferred 180 S. W. 2d 54 .....60, 70

Authorities

Mo. Stat. Ann., Section 527.260 .....60, 70

In the
Supreme Court of Missouri,

January Call 1967.

Louis Wallach, Mollie Wallach, his wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 245,269. (St. Louis County.) No. 51,513. (Supreme Court of Missouri.)

On Appeal to the Supreme Court of Missouri from the Circuit Court of St. Louis County, Division No. 1, Honorable George E. Schaaf, Judge.

Appellant's Statement, Brief and Argument.

I. Jurisdiction.

The Supreme Court has jurisdiction herein because title to real estate is involved in this appeal in a suit by the original plaintiffs, Louis Wallach and Mollie Wallach, to set aside a deed and quiet title to real estate they theretofore sold and conveyed to the defendants, who in turn asked the Court to quiet their title. Two more co-plaintiffs, Shirley Kash and Richard Wallach, entered by intervention later, and alleged creditors of defendants tried unsuccessfully to intervene. The creditors did not join in the appeal and we are not now concerned with them.

II. The Pleadings.

The petition filed February 13, 1962 (Tr. p. 1), alleged that Respondents Louis and Mollie Wallach (Plaintiffs), owned four lots in St. Louis County, Mo., and that Appellants (whom we will call defendants) claimed some interest therein "without any right whatsoever" and prayed that defendants be required to assert their claims, or be forever barred.

The answer filed April 16, 1962 (Tr. pp. 2 and 3) sets out that defendants own the property and asks that the Court quiet title in defendants.

Then over a year later, Shirley Kash and Richard Wallach joined as substitute or additional parties plaintiff in an Amended petition by them alleging that on November 20, 1962, original plaintiffs conveyed to Shirley Kash as straw party for Richard Wallach the real estate at issue; and that prior to January, 1961, Louis Wallach operated a general salvage business [colloquially known as a "Junk Yard"], on the real estate in question and that, defendant (appellant) Friedman came in the business in 1961 under oral contract to organize a corporation to be owned and operated 50-50 by Friedman and Louis Wallach, Friedman to advance $10,000.00 cash operating capital; and they further allege that plaintiffs Louis and Mollie Wallach were persuaded to convey the property to defendant Jack Joseph as straw party for the proposed corporation, whereas Friedman alleges that Jack Joseph was actually a straw party only for Friedman; the Amended Petition further alleges that Louis Wallach continued in possession until Friedman locked him out in April of 1963 (after this suit was filed). This so-called Amended Petition prayed (Tr. pp. 11 and 12) in the alternative for recission of the deed to Jack Joseph, or in the alternative for a vendor's lien of $20,000.00, and

receivership pendente lite. (The Transcript on Appeal omitted the motion of new parties to intervene, which was sustained and is not germane to the merits.) Defendants' answer filed on the day of trial, November 19, 1963, to this Amended Petition (Tr. pp. 13, 14, 15 and 16) alleged that Jack Joseph acquired good title March 9th, 1961, to the property by warranty deed from Louis and Mollie Wallach, and that defendant Friedman paid $69,000.00 for said real estate, made improvements, and went in business for himself and never made any agreement about partnership or incorporation; pleaded failure of plaintiffs to come into equity with clean hands; alleged this suit to be part of a scheme to defraud Friedman of the property and prayed for dismissal of this action.

III. The Judgment.

The Court found for the plaintiffs in both the Interlocutory Decree of December 17, 1963 (Tr. pp. 477-489), giving title to plaintiffs subject to defendants' equitable lien for $6,892.95 for expenses and improvements, and the final decree of March 24, 1965 (Tr. p. 528), which decreed title to plaintiffs, denied defendants then attorney Charles L. Moore a lien for fees, allowed plaintiffs' attorneys, Boggiano & Hessel, a lien for $5,000.00 attorneys' fees, allowed plaintiffs' prior attorneys, Becker & Becker, a lien for fees of $500.00, denied the motion of Jacob Stransoner for a judgment lien against Friedman, decreed that Friedman has no title to the land or improvements or quonset hut he erected thereon, quieted title in plaintiffs, affirmed the interlocutory decree, charged Friedman with rent at $15.00 per day from November 22, 1963, to March, 1965, a total of $7,245.00 erasing the $6,892.95 judgment for him for improvements and investment leaving a balance due plaintiff of $352.05 plus $15.00 per day until Friedman moves out, plus costs.

IV. Procedure.

Motion for new trial was filed April 1, 1965, and overruled April 30, 1965 (Tr. pp. 532-33), and Appeal taken May 8, 1965. After appeal, present counsel for defendants (Appellants) entered the case. After Judgment, there being no appeal bond, executions were carried out that will have to be put in status quo if the case is reversed, and the Mandate should generally order all post judgment proceedings reversed, but we will not burden this court with these details now. On reversal, the Court *Nisi* can be directed to right any such wrongs.

V. The Plaintiffs' Testimony.

The testimony was long but we must digest it quite briefly.

Earl Smith, an attorney representing the holder of the first deed of trust on the property in question (Tr. pp. 18-20), for $55,000.00 dated in 1957, in 1960 threatened foreclosure by Trustee Obrock (Tr. 22) and was paid $1,000.00 plus interest to stop the foreclosure, leaving $46,000.00 balance. That later notes were paid by Wallach or Friedman. Other foreclosures were threatened and payments made. Friedman and Wallach were both notified when payments were due in 1961-62. Mr. Wallach paid off to stop one foreclosure sale in October, 1962. Mr. Boggiano made a payment in the presence of Mr. Richard Wallach in November, 1963 (Tr. p. 42). Foreclosure was stayed pending this lawsuit. Plaintiffs' Exhibits 1-13 were identified by this witness—various notes and receipts and correspondence relating to the First Deed of Trust. Mr. Smith knew Mr. Friedman provided part of the money to pay some of the notes (Tr. p. 53).

Louis Wallach produced as his own witness (Tr. p. 57), testified he is married, grew up in the scrap business; at various times operated on his own account, or with his brother, or with Mr. Friedman (Tr. p. 58); purchased the land in 1956 for $70,000.00 (Tr. p. 60) and in 1960 rented part of the ground to Friedman (Tr. p. 62) when Friedman knew Wallach was in financial trouble and had been sick (Tr. p. 64). Friedman and he were real close friends (Tr. 67) and Friedman wanted to get Lou Wallach's name off the business (Tr. 69) so they shook hands on the deal and Friedman moved in. It was to be a 50% deal (Tr. 72) and the ground was to go into the proposed corporation. Friedman came up with the money to pay some notes (Tr. 75), but not the whole $10,000.00. Friedman put up $2,737.14 on January 15 or 16, 1961, to stop the foreclosure. Plaintiffs' Exhibit 14 was an earnest money contract which sold the property to Friedman for $69,000.00 (Tr. p. 86). Although Louis Wallach testified he never agreed to the contract, he admitted that his wife, himself and Mr. Friedman signed it, and later extended it. Exhibit 15 (Tr. p. 88) is the Warranty Deed, notarized in Louis Wallach's attorney's office (Tr. p. 89). Louis Wallach stated Mr. Friedman had had financial troubles (p. 91) and Mr. Wallach agreed with Mr. Friedman to put the deed in the name of Jack Joseph, as Straw Party for Harold Friedman.

Wallach testified he told Jack Joseph that Wallach and Friedman had formed a partnership and put the property in Jack Joseph's name (Tr. p. 94), and soon after that Jack Joseph and Harold Friedman fell out with each other. Then Mr. Louis Wallach told Friedman (Tr. p. 99) to put up all the money or call it quits. After that Mr. Friedman only came around about once a month. Some notes were put in evidence but Mr. Louis Wallach wasn't sure who paid Exhibit 16. He paid Ex. 17.

Richard Wallach paid Exhibits 18 and 19. Exhibit 20 is the deed to his brother and sister, Richard Wallach and Shirley Kash. She was added as a straw party for Richard Wallach (Tr. p. 105). Then in February, 1962, Louis Wallach, Harold Friedman and Jack Joseph went to Louis Wallach's attorney, Mr. Becker's office, together to settle things up. Mr. Friedman and Mr. Joseph left the meeting and this lawsuit was dictated that day (Tr. 107) in February, 1962 (Tr. p. 109), and Louis Wallach stayed on in business until May of 1963, and from February, 1962, to May, 1963, he never saw Mr. Friedman (Tr. p. 110).

In May, 1963, Mr. Friedman's employees tried to unload merchandise on the property, but Mr. Louis Wallach told the truckers not to unload until the Court decides this case. So the next day the locks had been changed (Tr. p. 111) and my attorney advised me to stay away until this case is decided (Tr. p. 111). Mr. Louis Wallach stayed away until trial time (Tr. p. 112).

(After Judgment Mr. Richard Wallach took possession.)

Mr. Louis Wallach further testified that the purported closing statement (Exhibit 21, Tr. p. 114) was not a closing statement but a partnership agreement. The $2,737.14 paid on the mortgage (Exhibit 1) is the first credit on the closing statement (Tr. p. 115). From pages 115 to 120 the testimony details the monies Friedman paid on the property per the statement Exhibit 21. That the property was worth over $100,000.00 (Tr. p. 122) in March of 1961.

Exhibit 22 is Friedman's note for $1,000.00 given March 9, 1961 (Tr. p. 121), shown on the closing statement but never paid. Merchants licenses of Wallach, of Harlan Co., photos of the property and advertising contracts were in evidence also as Exhibits 23, 24, 25, 26, 27, 28, and 29 (Tr. pp. 121-135).

On cross-examination (Tr. pp. 136 to 184), Louis Wallach repeated much of the same testimony; the following differences are significant.

The rent due from Lotus Towing wasn't billed (Tr. p. 143) because plaintiff thought Mr. Friedman was a man of his word, but November and December, 1960, were free and rent was charged from the start of 1961. There was no agreement to sell the property to Mr. Friedman (Tr. p. 145); it was made to look that way for better bank credit. At the time of this deal with Louis Wallach, his brother Richard wasn't on the property with him (Tr. p. 151). Louis Wallach did see the closing statement the day the deed was signed (Tr. 153). The deed was signed in blank for Mr. Friedman to fill in his straw party (Tr. p. 154). Louis Wallach told his attorney, Mr. Becker, about the partnership's deal all the way through (Tr. p. 168). Mr. Friedman paid the note on Mr. Wallach's Cadillac (Tr. p. 183).

On redirect examination, Mr. Louis Wallach testified he had owed the Bank $1000.00 or so on a 1954 Cadillac in 1961 and Mr. Friedman picked up the note for cash and still holds it (Tr. 185-86). Louis Wallach and his counsel made a list of charges between Mr. Louis Wallach's "Harlan Salvage Co." and Mr. Friedman's "United Motors", but this was admitted over objection (Tr. p. 108) for a limited purpose only and **not** to convert this action to quiet title into an action for an accounting between partners.

(During the noon recess, Mr. Friedman's file of exhibits was stolen from the counsel table in the courtroom and the transcript records an argument pp. 193-195.)

After recess, the witness Mr. Louis Wallach was withdrawn by consent to take another witness out of time (Tr. 194).

Victor Hallauer, an admittedly qualified real estate appraiser (Tr. 195), testified that the real estate at issue contains 145,665 square feet, or 3.67 acres, and in January, February and March of 1961, was reasonably worth $85,000.00 and had a reasonable rental value of $500.00 to $550.00 per month (Tr. p. 197).

William J. Becker testified (Tr. p. 200, ff) that he had been attorney for Louis Wallach after January, 1961, in connection with negotiations with Mr. Friedman and he outlined an agreement similar to Mr. Lou Wallach's testimony, and that Mr. Friedman told him that he had to have title to satisfy the bank pending the formation of a new corporation to succeed the Wallach-Friedman partnership; that he prepared the Earnest Money Contract and saw the parties sign it (Tr. p. 203), and that Mr. Friedman paid $2,737.14 to stop the foreclosure and promised orally to put $10,000.00 cash operating capital into the corporation, and Mr. Becker was to draw the corporate papers, Mr. Wallach and Mr. Friedman each to hold half the stock.

Exhibit 31, the foreclosure receipt, and Exhibit 32, the Earnest Money Contract, were produced in evidence by Mr. Becker.

William J. Becker further testified that the figures in the Earnest Money Contract, $69,000.00, were made up as follows (Tr. p. 209):

First Deed of Trust	$48,000.00
Second Deed of Trust	10,000.00
Pay Stockhammer's Judgment	1,000.00
Friedman to put up Corporate Cash Capital	10,000.00
Total	$69,000.00

That he later prepared the closing statement largely on information received from Mr. Friedman (Tr. p. 211) and

Mr. Friedman was to get a $4,000.00 credit for dismissing a lawsuit he had then pending against Mr. Lou Wallach and his brother, Richard Wallach. This left $1,726.50 due and Mr. Friedman paid Mr. Wallach $726.50 and executed a note to him for $1,000.00 dated March 9, 1961 (Tr. p. 213), due June 9, 1961, and unpaid. The deed (Ex. 15) was drawn in blank in Mr. Becker's office and later that day Mr. Friedman and Mr. Wallach in Mr. Becker's office had the name of Jack Joseph put in as grantee, by agreement. They agreed Mr. Joseph is a man they could both trust until the corporation is formed.

Mr. Becker further testified that there was lots of talk after that, but no corporation was ever formed (Tr. p. 220), and finally Mr. Jack Joseph talked about conveying back to Lou Wallach, but wanted $7,000.00 to satisfy his advances to Mr. Friedman (Tr. p. 223) and he left the office to get more data. The deed (Ex. 33, Tr. p. 224) was prepared, but never signed. Mr. Jack Joseph came back again to Mr. Becker's office on February 13, 1962, with Mr. Lou Wallach and Mr. Harold Friedman and we tried to settle the matter. Failing to do so, William Becker ordered them out of his office and this suit was filed later that day.

Mr. William Becker further testified that Mr. Harold Carey was Mr. Friedman's attorney then, and that he had tried to get the matter adjusted without success. That Mr. Friedman's check for $1,000.00 to settle the Stockhammer's Judgment was later returned to Mr. Friedman and Louis Wallach paid $700.00 to settle that Judgment.

On Cross-Examination, William Becker produced the original earnest money contract and testified that the full consideration was to be $69,000.00 to reflect a partnership agreement, not a sale. That Jack Joseph was Harold Friedman's straw party. The deed was delivered and recorded in the usual way (Tr. p. 241) as a perfectly nor-

mal transaction. There once was an effort to sell the property to settle this lawsuit but it fell through. There was a for sale sign on it for a while (Tr. p. 246). That this suit was filed on a short petition to quiet title (Tr. p. 247) and after that he met Mr. Friedman a few times, but never discussed this matter with him. Then in November 1962 (Tr. p. 250 ff), plaintiffs quit claimed the property to Louis Wallach's sister and brother, Shirley Kash and Richard Wallach, because Richard had put up money to stop another foreclosure (Tr. p. 251). All the demands to incorporate were by telephone. No letters were written (Tr. p. 256).

The redirect examination of Mr. William Becker was repetitious (Tr. pp. 257-262).

Joseph Becker, an attorney practicing in the office of his cousin, William Becker, testified he attended a meeting with Mr. Jack Joseph in William Becker's office about six weeks before suit was filed (Tr. 265), and Mr. Jack Joseph refused to sign back the property until Mr. Friedman should pay Mr. Jack Joseph $7,000.00. That he had once practiced law in Mr. Carey's office and knew Mr. Friedman as a client of Mr. Carey's. That he helped prepare and actually filed this law suit and the lis pendens (Tr. p. 270).

Richard Wallach testified (Tr. p. 272) he is in the scrap business on Easton Avenue, a brother of Louis Wallach, and that Mr. Boggiano represented him in December 1962 when he paid money to stop a foreclosure on the property at issue, and paid $2,316.44. That Mr. Friedman was not present when this was paid and a deed was made to him at Mr. Boggiano's insistence (Tr. p. 275). That his brother was in possession of the property at issue (Tr. p. 277), and he moved some of his property on to the lot also. There was an argument and Mr. Friedman was moving on the lot and Mr. Boggiano wanted to call the police, but

the witness prevented it to avoid publicity because Louis Wallach's trial was coming up in Court about that time (Tr. p. 279). That he paid to stop two or three foreclosures, before and after that clear back to 1956 (Tr. p. 282), and altogether has over $19,000.00 in the property. That he contracted with Friedman to put in a scale pit and Friedman and his Superintendent Goldie Dace tried to collect an inflated bill and were not paid. It is for $2,700.00 and suit to collect it is pending.

Richard Wallach on cross-examination testified Louis Wallach bought the property in 1956 and carried it in Richard's name for a month or two, then in name of Louis and wife, Mollie Wallach, then it was conveyed to Richard and Louis Wallach and the scale was put in and $1,000.00 paid on account. That he had $4,000.00 cash to stop the foreclosure in 1961 and Louis said he didn't need it, but Mr. Friedman stopped it, but later Richard Wallach got the deed in his name to protect his advances of over $19,000.00 (Tr. p. 293), and these he itemized as follows:

Purchase the lot	$ 5,300.00
Purchase the fence	$ 3,750.00
Mortgage payments	$ 4,350.00
Cash to Louis	$ 4,500.00
Front Fence and Pipe	$ 1,000.00
	$18,900.00

That in this suit in the Amended petition he (Richard Wallach) asks reformation of a contract between his brother, Louis Wallach, and the defendant, Harold Friedman, **but he knows nothing of the facts except what Mr. Boggiano advised him** (Tr. p. 297).

Turuche Lorretz, a professional trainer of prize fighters, testified he used to work for Louis Wallach (Tr. pp. 299-300), and in early 1961 he heard Mr. Louis Wallach and

Mr. Harold Friedman talk about the business and that it would take $10,000.00 to pick up the Second Deed of Trust and Mr. Friedman said that would be no problem (Tr. p. 301). That he later worked for Harlan Salvage, but refused to sign checks because Mr. Friedman's checks were always no good. That he delivered parts to Friedman's business on Olive Street. That he urged Lou Wallach to get away from Friedman (Tr. p. 305).

On cross-examination he testified a good deal about his travels with a prize fighter, but not much about relations between Friedman and Wallach.

On redirect he testified Mr. Friedman paid for some building materials on the premises in question (Tr. p. 312); that he had lived over 20 years in Mr. Louis Wallach's home, but he knew nothing about Mr. Friedman's bank account.

Stipulation: It was agreed that the tax collector is under subpoena, but the following taxes on the property were unpaid at the time of trial (Tr. p. 315 ff).

1961 County Tax	$1,053.74
1962 County Tax	1,192.48
1963 County Tax not due until next month will be	1,100.66
1962 City of Wellston	84.40
1963 City of Wellston	Lost Bill
	$3,431.22

Richard Wallach, recalled, testified that the corporation of his that contracted with Crown Construction Co. is Richard Wallach Metal and Supply Company (Tr. p. 317) and is a corporation in good standing.

Louis Wallach, recalled (Tr. p. 318), testified that Exhibit 37 is stationery of Harlan Salvage Company that he

and Harold Friedman had made up in February of 1961. That Exhibit 38 is stationery of Louis Wallach's old company, Lou Wallach & Company, and Exhibit 39 his later stationery of S. & L. Wallach Iron Company. That neither of these companies longer exist.

Exhibits 1-39 were offered. Exhibit 33 was objected to. All were admitted. Mr. Kopolow, a witness, was ill, but subject to his testimony, plaintiff rested. [**Note**: Mr. Kopolow never did testify.]

VI. The Defendants' Testimony.

Harold Friedman, one of the defendants, knew Louis Wallach since 1957 and in December 1960 (Tr. p. 321), or January 1961, went to see him to look for quarters to purchase the property from Mr. Wallach because foreclosure was pending. He was looking for quarters for Lotus Towing Co. These were suitable. Louis Wallach said he was in bad financial condition and might lose both his home and his business. He agreed to sell the land (Tr. p. 324) for $65,000.00. An earnest money receipt was drawn up later. The sale included the inventory, except a few items. Then Mr. Friedman engaged Leroy Kopolow, an attorney, to close the deal (Tr. p. 329). Mr. Kopolow and Mr. Friedman went with Mr. Wallach and his attorney, Mr. Becker, to the title company to stop the foreclosure sale and close the deal for the property. The closing money was paid and a note for $1,000.00 given in the closing was later paid by Mr. Friedman paying off a note for Mr. Wallach at the bank.

There was no agreement to form a corporation or to pay in $10,000.00 for operating capital (Tr. p. 334). That Mr. Friedman told Mr. Becker he would form Jorosan Corporation to hold title to the land, the name being formed from the first letters of Friedman's three daughters named Joan, Rosalie and Sandra.

That Mr. Friedman had no plans for any corporation with Mr. Wallach, but let Mr. Wallach live in the house on the property for a short time until he could find a place to move his family. But Mr. Friedman took possession of the land before the Wallach family moved off. They eventually moved, except Mr. Wallach retained desk space for his business (Tr. p. 339). Two more buildings were erected by Mr. Friedman in 1963 and Mr. Friedman installed also an awning and two insulated offices (Tr. p. 342), gas heat, plumbing repairs and other repairs, all at a cost of approximately $5,000.00, plus $5,000.00 for the quonset hut.

On Cross-Examination, Mr. Friedman testified that the Mayor of Wellston had recommended this property to him so he went over and bought it, that Mayor Hayes went with him to look at it the first time (Tr. p. 348). That Lotus Towing Co. was operated by Mr. Joseph McDermott and was a prospective tenant, and Mr. Friedman had no interest in Lotus Towing Co. except as a debtor for $2,000.00 for towing services rendered to Mr. Friedman's company, United Motors. Mr. Wallach offered to sell the property for $75,000.00 (Tr. p. 351) and they talked figures as Mr. Wallach showed Mr. Friedman the property and salvage business. The value was only about $2,500.00 to $5,000.00 for the salvage business run by Mr. Wallach. That Mr. Wallach agreed to a sale for Mr. Friedman to $65,000.00 and shook hands on it in the presence of Mayor Hayes. Then Mr. Wallach was overcome with joy that it was sold (Tr. p. 356). Then Mr. Friedman investigated the tax bills and checked into the deeds of trust, and talked to bank officers about them.

Lotus Towing Company agreed to move on and pay $300.00 a month rent for the part of the property, $100.00 a month cash and $200.00 a month credit on what Mr. Friedman's company owed Lotus. That was a Saturday.

On Sunday, Mr. Friedman saw Mr. Wallach again and paid $300.00 cash on the purchase so Mr. Wallach could handle some of his immediate needs. This took a half hour.

That they next met at Mr. Becker's office on January 16th and Mr. Becker prepared an earnest money contract, but the price went up from $65,000.00 to $69,000.00 (Tr. p. 365) to account for inventory and some other items. So Mr. Friedman and Mr. Wallach signed the contract at Mr. Becker's office (Tr. p. 369) and together went to Mr. Wallach's home and saw Mollie Wallach sign it (Tr. p. 370). Then the $7,100.00 closing money was partly paid and the foreclosure was stopped. Mr. Wallach's business was defunct (Tr. p. 374). That Mr. Friedman had a copy of the closing statement until his papers disappeared from the Court room the second day of trial (Tr. p. 379). The sale included some personal property, but the requested written inventory was not received by Mr. Friedman (Tr. p. 381). The deed to the property he bought and paid for that day was recorded March 9th, 1961.

That Mr. Friedman had all his papers in his file (Tr. p. 385) and it disappeared (sic. out of the Court room) and "you know where it disappeared" (Tr. p. 193, 379, 386). That Mr. Friedman does not have his file, but thinks he paid Mr. Wallach another $650.00 that does not show in the closing statement (Tr. p. 387). That he paid Mr. Wallach $1,000.00 cash for the Stockhammer Judgment which Mr. Wallach settled for $700.00 (Tr. p. 390).

That Mr. Friedman paid no notes on the property after September 9th, 1961 (Tr. p. 401). Mr. Wallach has been paying the notes in lieu of rent. That Martin Koplow worked with Mr. Friedman for a while and Harlan Salvage Co. was a name used by Lou Wallach named after Martin Kopolow's son, Harlan Kopolow. Lou Wallach and Lotus Towing Co. had trouble over space and finally Lotus was moved out (Tr. p. 418) after Mr. Wallach

agreed to pay the notes in lieu of rent. Mr. Wallach was just a tenant, but he never paid rent. Finally, Mr. Friedman changed the locks (Tr. p. 420) and took possession. Then he had the driveways and yard blacktopped, added air conditioning (Tr. p. 426) and repaired the buildings and water pipes. (Mr. Friedman was temporarily withdrawn, (Tr. p. 431).).

Jack Joseph, one of the defendants, testified he knew Mr. Friedman over 30 years, and frequently loaned Mr. Friedman money; that he put money into this deal for Mr. Friedman—close to $7,500.00; that all the receipts were in an envelope on the counsel table (that had been stolen!).

On Cross-Examination (Tr. p. 433) Mr. Jack Joseph testified the $7,500.00 he advanced Mr. Friedman from time to time on this property was cash, not checks; that he didn't know where the deed is, and "Everything I had invested in there, Mr. Boggiano, disappeared yesterday" (Tr. p. 435). That he refused to sign Exhibit 33, and told Mr. Becker, "my money ain't straw" (Tr. p. 438) and walked out on Mr. Becker. That Joe Becker was not there; that he never saw Joe Becker until he came to Court; but he, Jack Joseph, was partner with Mr. Friedman on this deal. That although Mr. Wallach stayed in possession until May 8th, 1963, Mr. Wallach had no interest in the property (Tr. p. 441). That the papers were in the binder that was stolen from the counsel table; and that all Mr. Friedman's plans were agreeable to him (Tr. p. 447).

On Redirect Examination, Jack Joseph testified he never heard about $10,000.00 operating capital until he came in the Court room.

Cross-Examination of Mr. Friedman was resumed. He testified about improvements made on the property, and he made these improvements with knowledge this suit was

pending (Tr. p. 450) and now operates with his daughter as Dixie Auto Parts. Exhibit 40 is the merchant's license of B & H Company, as a partnership of Harold Friedman et al. (Tr. p. 454).

Peter Joseph McDermott testified for defendants (Tr. p. 458 ff) that he owns Lotus Towing Co. and also does work for Mr. Friedman; that he rented the property from Mr. Friedman and not from Mr. Wallach; that he knew about the deal to move out to the property in question; and moved there from a place on Kienlen Avenue, because Mayor Hayes did not want the cars right across the street from Wellston City Hall on Kienlen Avenue because they looked bad; so Harold Friedman and Jack Joseph bought the property and he moved there, and stayed until about July 4th, 1961 when Jack Joseph told him to move off.

On Cross-Examination, Mr. McDermott could not remember ever talking to Mr. Wallach before he moved in but Mr. Wallach was there the whole time he was, and he and Mr. Wallach had many arguments. That rent was credited on a bill Mr. Friedman owed him (Tr. pp. 465, 466). That he had no idea how much space he used.

On Redirect Examination, Mr. McDermott testified that while he was at 1618 Lucas Hunt Road, a quonset hut was erected, and after the Wallach family moved out of the brick residence, Mr. McDermott had his office in the living room.

Mr. Boggiano offered some tax records in evidence (Tr. pp. 468-472). (Defendants rested here but the record fails to show it but shows the next witness as Rebuttal.)

VII. Rebuttal Testimony.

In Rebuttal, **Louis Wallach** was recalled as a witness (Tr. p. 472) that he never agreed to pay rent to Mr. Har-

old Friedman or Mr. Jack Joseph; and he never agreed to sell the property to them at any price. Both sides rested (Tr. p. 475). Defense counsel made a long, oral motion to dismiss, which was denied. The parties stipulated that this cause be taken as submitted **on the merits** rather than on the Order to show cause why a receiver should not be appointed. Case submitted on November 22nd, 1963.

VIII. Interlocutory Decree.

This decree has been digested earlier in this book (Brief, page 3) but counsel cannot understand why an Interlocutory Decree was entered after final hearing on the merits. The Interlocutory Decree is in the transcript, pp. 477 to 489. It was dated December 17th, 1963 and found all issues in favor of plaintiffs except that there was insufficient evidence for the Court to make a finding on the cost of improvements made by defendants, and the Court reserved jurisdiction to hear and determine the value of improvements made by defendants and any other matter "that may require the attention and action of the Court."

IX. Time Lapse.

Almost eleven months intervened between the Interlocutory Decree of December 17th, 1963 and the Supplemental Hearing of November 6th, and 27th, 1964 (Tr. p. 489).

X. Supplemental Evidence Taken November 6th and 27th, 1964.

A. By Plaintiff.

Harold Grober, a valuation engineer and appraiser, recently inspected the property at issue and in the presence of Mr. Friedman inspected the improvements made by Mr. Friedman and values them as follows (Tr. p. 495, ff):

	Amount	Tr. Page
Aluminum Awning	$ 550.00	495
Sash	44.00	495
South Window	64.00	496
Office Enclosure	577.00	497
Electrical Work	319.00	498
Plumbing	35.00	498
Black top paved yard	750.00	499
Quonset Hut	2,449.00	500
Damage front door	88.00	502
	$4,876.00	(Edited)

Cross-Examination of Mr. Grober, as to how he arrived at these figures and brief redirect were not revealing of anything new.

B. By Defendant.

Anthony Vaccaro, a general contractor, testified he did work on the dilapidated buildings existing on the property at issue for Mr. Friedman, for a blanket price to fix up an office for $1,340.00.

On Cross-Examination (Tr. pp. 512-521) he detailed the work done.

C. By Plaintiff.

Harold Friedman, a defendant, recalled by plaintiff, testified he has been in possession since the Interlocutory Decree but paid no rent.

Stephen A. Boggiano, attorney for 38 years, counsel for Richard Wallach, testified to services rendered in this case and that his services are worth $5,000.00.

XI. Final Decree.

After delay, the Final Decree was entered March 24th, 1965 and is set out in Section IV. of this Brief, Supra.

XII. Motion for New Trial or Rehearing.

This motion was timely filed April 1st, 1965 and is so important we print it in full, caption and signatures omitted.

Motion for New Trial or Rehearing.

Comes now Harold Friedman and Jack Joseph, defendants herein and moves the Court to set aside its final order herein and grant the defendants a rehearing or new trial for the following reasons, to-wit:

1. The Court erred in granting a purported interlocutory decree herein ordering the payments of certain rents to plaintiffs and then subsequently entering its final order decreeing certain moneys due defendant Harold Friedman for improvements on the real estate be applied to the payment of rents as ordered by the Court in its interlocutory decree.

2. The Court erred in its finding that rents for the real estate be paid to plaintiffs without making a final order so that defendants could exercise their right to appeal.

3. The Court erred in directing payments of money to plaintiffs for rent without providing a final order from which defendants could appeal.

4. The Court erred in its final order in taking the amount allowed defendant Harold Friedman for improvements made upon the property and applying the sum so allowed as a credit on the payment of purported rent to plaintiffs.

5. The Court erred in finding that the transaction between plaintiffs and defendants was a result of fraud, coercion or mistake so that the rules of equity would apply.

6. The Court erred in not finding that plaintiffs had an adequate and complete remedy at law.

Wherefore, defendants Harold Friedman and Jack Joseph pray the Court to enter its order setting aside the final decree and grant defendants a new trial herein.

XIII. Assignment of Errors.

1. The Court erred in decreeing title in real estate at 1604-18 Lucas-Hunt Road, St. Louis County, Missouri to be in plaintiffs alone, where their own testimony showed they had conveyed it to defendants by warranty deed.

2. The Court erred in decreeing full title to plaintiffs when their own testimony showed partnership and under the evidence they had a half interest at best.

3. In a suit to cancel or reform a deed for fraud, the Court erred in granting relief based on fraud where the evidence did not establish the elements of fraud.

4. The Court erred in granting a purported interlocutory decree herein ordering the payments of certain rents to plaintiffs and then subsequently entering its final order decreeing certain moneys due defendant Harold Friedman for improvements on the real estate be applied to the payments of rents as ordered by the Court in its Interlocutory Decree.

5. The Court erred in its finding that rents for the real estate be paid to plaintiffs without making a final order so that defendants could exercise their right to appeal.

6. The Court erred in directing payments of money to plaintiffs for rents without providing a final order from which defendants could appeal.

7. The Court erred in its final order in taking the amount allowed defendant Harold Friedman for improvements made upon the property and applying the sum so allowed as a credit on the payment of purported rent to plaintiffs.

8. The Court erred in finding that the transaction between plaintiff and defendants was a result of fraud, coercion or mistake so that the rules of equity would apply.

9. The Court erred in not finding that plaintiff had an adequate and complete remedy at law.

10. The Court erred in permitting Richard Wallach and Shirley Kash to become additional parties plaintiff, when they acquired their title after suit herein and lis pendens were pending because whatever title they acquired derived from the original plaintiffs, Louis Wallach and Mollie Wallach, his wife, who had theretofore conveyed to defendants.

11. The Court erred in granting relief to plaintiffs who did not come into equity with clean hands.

12. The Court erred in not dismissing plaintiffs' petition.

13. The Court erred in not granting defendants' cross petition to quiet their title to real estate.

14. The Court erred in refusing to sustain the defendant's motion to dismiss at the close of the first hearing (Tr. p. 475).

XIV. Points and Authorities.

1.

This is an action in equity, which the Supreme Court hears de novo; but "where there is conflicting verbal testimony, involving credibility of witnesses who have appeared before the Chancellor, this Court will usually defer to his findings unless satisfied that they are against the weight of the evidence."

Per Hyde, C., In Fessler v. Fessler, 60 S. W. (2nd) 17, l. c., p. 23;

Kingston v. Mitchell, 117 S. W. (2nd) 226, l. c. 229;
Cornet v. Bertelsmann, 61 Mo. 118;
Farmer's Bank of Higginsville v. Handly, 9 S. W. (2nd) 881;
Gross v. Byler, 297 S. W. 391, 397.

2.

Louis Wallach is a convicted felon who has been found by a jury and this Supreme Court, not to be worthy of belief.

State v. Wallach, 389 S. W. (2nd) 7.

3.

The Court should not defer to the lower Court here because the testimony did not show the elements of fraud.

Failure to prove any one of the essential elements of fraud which are a representation, its falsity, scienter, deception and injury, is fatal to recovery for fraud.

Maupin v. Provident Life and Accident Ins. Co., 75 S. W. (2nd) 593;
Langley v. Imperial Coal Co., 138 S. W. (2nd) 696, 234 Mo. App. 1087;
Lowther v. Hays, 225 S. W. (2nd) 708.

4.

Reviewing Court will not uphold decree cancelling deed which clearly appears to be against weight of the evidence, because evidence must be clear, cogent and convincing to warrant setting aside written instrument.

Batson v. Peters, 89 S. W. (2nd) 46;
Barlow v. Scott, 85 S. W. (2nd) 504;
Picket v. Repple, 114 S. W. (2nd) 999, 342 Mo. 274;
Shaw v. Hamilton, 141 S. W. 2nd 817, 346 Mo. 366.

5.

If there were to be judgment for the plaintiffs, the Court erred in undervaluing the improvements made by defendants.

Mizell v. Osmon, 189 S. W. 2d 306, 354 Mo. 321.

6.

A partner or co-tenant is not entitled to rent from his associate, in possession but only to rents collected.

Hinton v. Powers, 38 Mo. 353.

7.

The oral motion to dismiss at the close of the whole case should have been sustained.

8.

Plaintiffs did not come into Court with clean hands, and intervenors were bound by the Lis Pendens.

Hope v. Blair, 16 S. W. 595, 105 Mo. 85, 24 Am. St. Rep. 366;

Missouri State Life Ins. Co. v. Russ, 214 S. W. 860;

Wo lum v. Tarpley, 196 S. W. 1127;

Miller v. Heisler, 187 S. W. 2d 485 transferred 180 S. W. 2d 54;

Mo. Stat. Ann., Section 527.260.

9.

Defendants' Cross-Plea to Quiet Title should have been granted.

10.

This Court should reverse the judgments below, quiet defendants' title to the real estate, and award defendants a judgment against plaintiffs for rent since defendants

were dispossessed, remanding the case only to refund monies paid by Harold Friedman under execution, and for such other Circuit Court Orders as the Supreme Court may direct.

XV. Argument.

1. Deference to Court Below.

This is an equity case and we want to keep our argument simple and to follow our points and authorities quite closely. This is a case of very diametrically conflicting testimony, so great that if you believe plaintiffs, defendants were in partnership with plaintiffs; but if you believe defendants, they purchased the land from plaintiffs on their own account and were not partners. The Court disbelieved both and rescinded the transaction in toto, when at best the Court should have awarded plaintiffs only a half interest in the property. This is so great a departure from the evidence as to shock the conscience of the Supreme Court and require reversal of the case.

In *Kingston v. Mitchell,* 117 S. W. 2d 226, this Court reaffirmed the age old doctrine that in an equity appeal, "* * * the case is heard here de novo and this court passes upon the weight of the evidence. However, where there is conflicting verbal testimony involving credibility of witnesses who have appeared before the Chancellor, this court will usually defer to his findings unless satisfied that they are against the weight of the evidence." 117 S. W. 2d 226, l. c. 229, column 2.

The origin of the rule of law under consideration is quite ancient, but as early as 1875 this Court reversed an equity case where clearly erroneous; *Cornet v. Bertelsmann,* 61 Mo. 118. The case of *Farmers' Bank of Higginsville v. Handly,* 9 S. W. 2d 881, is an example of an equity case reversed by this court, on weight of the evidence.

See also, *Gross v. Byler,* 297 S. W. 391, in which this court held the lower court did not have enough proof to show fraud, as to the value of land that might have had oil on it, and reversed a case to set aside a deed for too cheap a price, on conflicting evidence.

The evidence here was quite conflicting in many minor details. For example, Joseph Becker testified he sat in on a certain conference (Tr. p. 265), but Jack Joseph denied that Joseph Becker was present (Tr. p. 440); and plaintiff's own witness, Mr. Lorretz, testified Mr. Friedman was to pick up a $10,000.00 deed of trust (Tr. p. 301), which is entirely different from plaintiffs' claim the $10,000.00 was to be operating capital; and Joseph Becker and William Becker both testified they were to form a corporation for plaintiffs and defendants as partners, if so, they testified against their clients Messrs. Friedman and Joseph and in favor of their clients, the Messrs. Wallach.

And how can this court defer to a Chancellor who in both the interlocutory and final decrees, goes into the valuation of improvements and renders an accounting (Tr. pp. 483, 484, 530), after the Court admitted testimony of expenses **conditionally** on issue of land usage and ruled that general accounting between the parties was not at issue here (Tr. pp. 186, 187, 188).

Likewise, the court and the plaintiff talked much about partnership throughout the trial, and such went in without objection at the time, no doubt on the theory that an equity court disregards incompetent testimony; but we can not see why all this was not objected to as improper parol evidence to vary the terms of a written instrument; Plaintiff's Exhibit 14, the receipt for earnest money, is in the name of "Harold Friedman" and **the following basic exhibits fail to show either partnership or the intention to form a corporation.**

Plaintiffs' Exhibit 14, Earnest Money Contract, including extension, "Harold Friedman."

Plaintiffs' Exhibit 15, Warranty Deed, "Jack Joseph."

Plaintiffs' Exhibit 21, Closing Statement, "Harold Friedman."

Likewise some other exhibits show that Louis Wallach tried to rescind the transaction and do some acts on his own, but there are no Wallach-Friedman partnership or corporation exhibits in evidence.

See also:

Plaintiffs' Exhibit 10, Receipt to Mr. Boggiano does not show partnership or for whom he was acting.

Plaintiffs' Exhibit 12, Receipt to Louis and Mollie Wallach.

Plaintiffs' Exhibit 20, Deed by Louis and Mollie Wallach to Shirley Kash is **not** a deed from a partnership.

Plaintiffs' Exhibit 22, Note for $1,000.00 to plaintiffs signed by Harold Friedman, **not** by a partnership.

Plaintiffs' Exhibit 27, Letter demanding that Louis Wallach refund rental paid to him in error by St. Louis Outdoor Advertising, Inc., was not shown to have been answered by a partnership or at all.

Plaintiffs' Exhibit 36, An agreement to reimburse Richard Wallach was not signed by any partnership and would not create a partnership debt.

Plaintiffs' Exhibit 41, Is the only exhibit in the case that uses the word "partnership" and it is an application for a Merchant's license after the suit was filed, and there is **no rebuttal** of Harold Friedman's testimony that this was a partnership of members of the Friedman family (Tr. p. 453).

Without belaboring the point further, we submit that this Court should not defer to the lower Court here for at least three reasons: (1) that the doctrine of deference applies largely to cases of conflicting parol testimony, *not to a case where documentary proof clearly contradicts the court's findings;* (2) that this court should not defer to a court which excluded evidence relating to an accounting and then tried to settle an account in favor of the party who objected to such evidence; and (3) that even in the absence of any objections, the court should have disregarded parol evidence to vary the terms of written instruments. William Becker is one of the most capable attorneys in St. Louis County; he knows what corporation and partnerships are; if a partnership or a corporation had been contemplated, he would have drawn the earnest money receipt to "Harold Friedman Trustee for a partnership (corporation) to be organized." He drew it to **Harold Friedman.** That's it!

2. Louis Wallach.

Mr. Louis Wallach, the moving and verbose plaintiff, testified at length in his own behalf (Tr. pp. 57-194, 318-320, 472-473) and no real attempt was made to impeach his character but on page 279 we find that his brother Richard testified about Mr. Louis Wallach's trial "coming up". The Court reporter misheard the name of Attorney Martin A. Rosecan as "Mr. Roskin". Since then, the trial of Louis Wallach in Circuit Court for first degree murder and on appeal took place, the jury disbelieved a plea of self defense, and by the very act of affirming a ten year sentence on a verdict of guilty of manslaughter, this court had to infer that the jury was right and Louis Wallach is not worthy of belief. The shooting took place in the premises at issue here. This court should again refuse to believe Louis Wallach, heretofore adjudged not to be truthful.

In *State v. Wallach*, 389 S. W. 2d 7, l. c. 14, after discussing both self defense and the defense of property this Court (per Judge Henley, Div. 1) said, "But we do not find evidence supporting defendants' theory."

3. The Elements of Fraud.

The elements of fraud are, "(1) a representation, (2) its falsity, (3) its materiality, (4) knowledge of its falsity, or ignorance of its truth on the part of the person making representation, (5) his intent that it should be acted upon by person and in the manner reasonably contemplated, (6) ignorance of its falsity on the part of the person to whom the representation is made, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. More briefly stated, the elements are a representation, its falsity, scienter, deception and injury. Proof of each of these elements is essential to a submissible case. Failure to prove any one of them is fatal to a recovery." *Per Sutton, C., in Maupin v. Provident Life and Accident Insurance Co.*, 75 S. W. 2d 593, l. c. 596.

It is true that the amended petition in its paragraphs 3, 4, 5, 6, 7 and 8 (Tr. pp. 5, 6, 7, 8) attempted to plead fraud, but this alleges that plaintiffs Louis and Mollie Wallach conspired with defendants Harold Friedman and Jack Joseph to defraud co-plaintiff Shirley Kash and Richard Wallach after this suit was brought (Tr. p. 1) (suit filed February 13, 1962) when the evidence shows Joseph Becker filed a *lis pendens* that day (Tr. p. 270); and it is hard to see how Richard Wallach and Shirley Kash could be defrauded when they could have seen the *lis pendens* of record had they run the title before accepting a deed dated November 20, 1962, but not recorded until April 19, 1963 (Plf. Exhibit 20). Even then, they did not intervene until September of 1963.

It does not take citation to case law to remind this Court that the usual fraud cases are situations where a poor ignoramus without the benefit of counsel is outwitted by a smart operator; but here is a case where the parties claiming fraud were represented by smart counsel (see testimony of Mr. Boggiano and Messrs. Becker, Tr. pp. 200-271, and 523-527) and thus were not the "under-dog" of whom advantage could be taken.

See also, *Langley v. Imperial Coal Co.*, 138 S. W. 2d 696, l. c. 698, holding that "Fraud is never to be presumed. Proof of fraud must be definite and if facts proven consist as well with honesty as with fraud the transaction will be held honest." Here again we are confronted with an honest purchaser closing a deal in the usual way at the title company (Tr. p. 241) as a perfectly normal transaction. When counsel of the qualification and experience of William Becker testified to a normal transaction (Tr. p. 241) it was, as he said, a "Perfectly normal transaction." We must assume that fraud would not be a normal transaction. There was no proof of fraud.

The testimony that putting up $10,000.00 would be no problem to Harold Friedman (Tr. p. 301) and other similar testimony, is nothing more than mere opinion or future plans; and this Court has held that even where in writing, "Mere statements of opinion, expectations and predictions for the future are insufficient to authorize a recovery" (i. e., for fraud). *Lowther v. Hays,* 225 S. W. 2d, l. c. 714, Column 1.

4. Evidence to Cancel a Deed Must Be Clear, Cogent and Convincing.

We have cited in our Points and Authorities, four cases holding that evidence to upset a deed for fraud must be clear, cogent and convincing. This general rule has been followed many times, but we challenge the respondents to

show us any clear evidence of fraud anywhere in the record. We do not abandon this point, but we feel the burden is on respondents to sustain it.

We submit, that the three prime written exhibits, executed in a perfectly normal manner by the parties, properly signed and, when necessary, notarized and recorded, are uncontroverted and these three exhibits, **No. 14 the earnest money contract and extension, No. 15 the Warranty Deed,** and **No. 21 the Closing Statement,** are really the only clear, cogent and convincing evidence in this case. To hold otherwise would shake the very foundation of every real estate transaction done in the normal and ordinary course of business.

5. Value of Improvements.

The Court in the Interlocutory Decree allowed appellants only $6,892.95 for expenses and improvements, on recission of the purchase. It is not disputed that compensation is proper (Plaintiffs took no cross-appeal), but we feel the evidence would require a recompense greater than this if the judgment were affirmed as to title. The following are shown as the Friedman investment:

Cash to stop foreclosure, Pltf. Exhibit 2 ...	$ 2,737.14
Other Earnest Money, Pltf. Exhibit 21 ...	4,950.00
Cash in Closing, Pltf. Exhibit 21	726.50
Cash to Louis Wallach (Tr. p. 390)	1,000.00
Improvements per testimony of Plaintiffs' valuation engineer Mr. Grober (Tr. pp. 495-502)	4,876.00
Repairs by Mr. Vaccaro (Tr. pp. 502-521)	1,340.00
Undisputed total	$15,629.64

And under the law, such improvements are compensable on recission, *Staub v. Phillips*, 271 S. W. 365, but the

measure of damages is not the cost of improvements but the sum by which the addition of the improvements increased the value of the freehold; *ibid,* head note 2. The evidence was that Louis Wallach paid $70,000.00 for the land in 1956 (Tr. p. 60); there is evidence that he agreed to sell it to Mr. Friedman for $69,000.00 in 1961 (Tr. p. 86) and his valuation engineer at the trial testified it was worth $85,000.00 (Tr. p. 197). The difference between $69,000.00 and $85,000.00 is $16,000.00, an increment of almost precisely the $15,629.64 Mr. Friedman and Mr. Joseph put into it, but as the first four items of the foregoing list were cash and not improvements, the Court should have figured the money due Defendants as follows:

Market Value at trial	$85,000.00
Value per Sales Contract	69,000.00
Increment	$16,000.00
Earnest Money and other Cash per closing statement, Plaintiffs' Exhibit 21	$ 8,363.64
Cash to Louis Wallach later (Tr. p. 390)	1,000.00
Due Defendants **if recission** be granted, not $6,892.95 allowed by Court, but actually	$25,363.64

6. Rents Awarded Plaintiff.

The first numbered error in the motion for new trial combines several ideas (Tr. p. 532), but among them charges that the court erred in awarding rents to plaintiffs. We cannot quarrel too much with rents if this court lets total recission stand; but if the parties were **partners** then one co-tenant cannot collect rent from the other at all, except upon ouster or a showing of wrongdoing; but no wrongdoing was shown here and no rents should be awarded to plaintiffs because defendants are sole owners.

Hinton v. Powers, 38 Mo. 353.

7. The Oral Motion to Dismiss.

The Oral Motion to Dismiss (Tr. p. 475) should have been sustained. This motion is well worded and outlines the following grounds for dismissal:

1. That no grounds to reform the earnest money contract were shown;

2. That no vendor's lien results where the $69,000.00 sales price, full consideration was paid.

3. No fraud was shown.

4. Plaintiffs showed no title in them to the premises involved.

Without abandoning this point, we will not reargue it here because it is clear from what we have already written that the motion should have been sustained and the case dismissed.

8. Plaintiffs Did Not Come Into Equity With Clean Hands.

Previous counsel raised this point in the Answer (Tr. p. 16) by alleging that Louis Wallach attempted to convey the real estate to Richard Wallach after suit was filed herein, as part of a wicked scheme to negate his warranty deed to defendants (Answer, paragraphs 10 and 11), that Louis Wallach's conduct has been such that he is not entitled to relief in Equity. This bad conduct was not shown by exact testimony, we admit, but certainly if a person had a meritorious cause of action he would not have gotten into a fracas in open court over the disappearance of defendants' exhibits (Tr. pp. 193-195), nor would he have had counsel testify against their former client. Nor would Richard Wallach have tried to maintain title paramount to a lis pendens. We cannot see why the lis pendens testified to by Joseph Becker (Tr. p. 270) was not offered in evidence **as an exhibit**, but plaintiffs are

bound by their own witnesses and there is nothing in the record to dispute the clear testimony of capable attorney Joseph Becker (Tr. p. 270), that he filed this suit and the lis pendens, so that if there was a transfer to anyone else they would take subject to the claim of Mr. and Mrs. Louis Wallach. Defendants' original answer (Tr. p. 2) praying the court to hold that plaintiffs had no title to the premises, was filed April 16, 1962 (Tr. p. 3), long before the date of attempted conveyance by the Louis Wallachs to Shirley Kash (Plf. Exhibit 20, dated November 20, 1962, recorded April 19, 1963), and it is not open to logical debate that a *lis pendens* gives notice to the world of this **entire** suit in equity, including the cross claim of defendants.

The *Lis Pendens* was not in evidence but we take the liberty of printing it as an appendix to this brief (Tr. p. 270; brief, p. 44, infra).

A recorded notice of lis pendens is constructive notice to a purchaser of an equitable claim on the land, and his purchase is subject thereto.

Hope v. Blair, 16 S. W. 595, 105 Mo. 85, 24 Am. St. Rep. 366;
Missouri State Life Ins. Co. v. Russ, 214 S. W. 860;
Woolum v. Terpley, 196 S. W. 1127;
Miller v. Heisler, 187 S. W. 2d 485, transferred 180 S. W. 2d 54;
Mo. Stat. Ann., Section 527.260.

Inasmuch as Richard Wallach and his straw party, Shirley Kash, took subject to the law suit, the court certainly erred in decreeing title in Richard Wallach.

9. Defendant's Plea to Quiet Title Should Have Been Granted.

Perhaps defendants' answers are not as full and complete as they might have been. In the original answer

(Tr. pp. 2 and 3), defendants set up ownership to the property and pray that their title be determined; and in the answer to the Amended Petition of Shirley Kash and Richard Wallach (Tr. pp. 13-16) defendants join issue with them, claim ownership and recite certain improvements made as evidence of ownership, and pray that the suit be dismissed and the court make "further orders consonant with the ownership of the property in the defendants." This is clumsy language at the worst, but would seem to be broad enough to constitute a prayer for judgment quia timet in favor of defendants.

10. Conclusion.

On all the points argued, it is submitted that the Judgment below was wrong in many particulars and this court should reverse the case outright and dismiss plaintiffs' petition outright; enter a decree that defendant Harold Friedman owns the said real estate in fee simple subject to encumbrances; enter judgment against plaintiffs for fair rental since defendant was evicted, based on Judge Schaaf's finding of reasonable rental of $15.00 per day seven days per week, now over $7,000.00 at the time this brief was dictated, to run until restoration of possession; set aside the lien of Mr. Boggiano for counsel fees as counsel for plaintiff; then the case should be remanded only for post judgment accounting, so that the trial court can set aside the money judgment against Mr. Friedman, order the sheriff to account to defendants for funds paid under writs of execution pending appeal without bond, put defendants back in possession, set aside the interlocutory decree and the final decree, and taxing all costs against the plaintiffs, Louis Wallach, Mollie Wallach, Richard Wallach and Shirley Kash.

Respectfully submitted,

David K. Breed,
Attorney for Defendants-Appellants.

Appendix.

State of Missouri, } ss.
County of St. Louis. }

In the Circuit Court of the County of St. Louis,
State of Missouri.

Louis Wallach and Mollie Wallach,
His Wife,
Plaintiffs,
vs.
Jack Joseph and Harold Friedman,
Defendants.
} No. 245,269.

Notice of Lis Pendens.

Take notice, that an action has been commenced, instituted and filed in the Circuit Court of St. Louis County, Missouri, on the **13th** day of **February**, 1962, returnable thirty days after service, by the above named plaintiffs against the above named defendants, in which said action the following described premises are sought to be charged with the claims hereinafter more particularly set forth. The description of said land is as follows:

> Lots 4, 5, 6, and 7 of the Subdivision of Horstman Property, on the Lucas and Hunt Road in U. S. Survey 2684, Township 46 North, Range 6 East, according to the plat thereof recorded in Plat Book 12, page 82 of the St. Louis County Records.

Notice is further given by said suit, that the plaintiffs pray that the Court define and declare that the plaintiffs are the sole owners in fee simple of the aforesaid described real estate, the same being an action to quiet title in favor

of plaintiffs and against the defendants named in said action.

Dated this **13th** day of **February**, 1962.

William J. Becker and
Joseph J. Becker,
By William J. Becker,
Attorneys for Plaintiffs,
7811 Carondelet Avenue,
Clayton 5, Missouri,
Parkview 7-7100.

Filed for Record Feb. 13, 1962 at 4:50 P. M. John L. Koob, Recorder of Deeds.

State of Missouri, }
County of St. Louis. } ss.

I, John L. Koob, Recorder of Deeds of and in the County of St. Louis, State of Missouri, do hereby certify that the foregoing is a true and complete copy of **Notice of Les Pendens** as the same appears of record in my office, which is recorded in Book A-5, Page 354 of the St. Louis County Records.

In Witness Whereof I have hereunto set my hand and official seal, this **23rd** day of **November**, 1966.

/s/ John L. Koob,
Recorder of Deeds,

(Seal)

By /s/ Lucile Dodge,
Deputy Recorder.

APPENDIX "G".

Respondents' Brief in the Supreme Court of Missouri.

In the
Supreme Court of Missouri,
Division No. 2.

January Session, 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 51,513.

Appeal from the Circuit Court of
St. Louis County, Missouri,
Division No. 1,
Honorable George E. Schaaf, Judge.

Brief for Respondents.

Stephen A. Boggiano,
Boggiano & Hessel,
722 Chestnut Street,
St. Louis, Missouri 63101,
Attorneys for Respondents.

In the
Supreme Court of Missouri,
Division No. 2.

January Session, 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents, vs. Jack Joseph and Harold Friedman, Defendants-Appellants.	No. 51,513.

Appeal from the Circuit Court of
St. Louis County, Missouri,
Division No. 1,
Honorable George E. Schaaf, Judge.

Brief for Respondents.

Statement of Facts.

This is a suit in equity filed in the St. Louis County Circuit Court, to set aside a deed to a parcel of real property, to vest title to the property in one of the plaintiffs, and for an accounting between the parties.

The parcel of property involved is located on Lucas & Hunt Road in St. Louis County, Missouri. It had been owned for many years by respondents, Louis Wallach and Mollie Wallach, his wife. Louis Wallach, in January of

1961, and for some time prior thereto, was engaged in the operation of a general salvage business at that location (Tr. pp. 60, 61, 62). He was in financial difficulties, and principal and interest notes secured by a first deed of trust on the property were in default. At that time, he was called on by appellant Harold Friedman, who was looking for a location for the Lotus Towing Company (Tr. pp. 62, 69).

According to the evidence offered by the respondents, Louis Wallach told Harold Friedman of his financial problems and thereupon they entered into an oral contract under which Friedman was to furnish the working capital and it was agreed that they would operate together a salvage business on the Lucas & Hunt property (Tr. pp. 65, 66, 68). The details of the agreement were that Friedman would pay certain principal and interest notes secured by a mortgage on the property, amounting to approximately $2700.00, then in default, pay in full an indebtedness secured by a second deed of trust on the property in the amount of $10,000.00, and advance the further sum of $10,000.00 for working capital. It was further agreed that a corporation would be organized to take title to the real property and the other assets of the salvage business, and that Louis Wallach and Friedman would each own one-half of the capital stock of the corporation (Tr. pp. 72, 170, 202).

Further testimony on behalf of the respondents established that at Friedman's insistence a contract for the sale of the real property was entered into between Louis Wallach and Mollie Wallach, his wife, and Friedman, called

a Receipt for Earnest Money. Subsequently, a Closing Statement and Warranty Deed, dated about March 9, 1961, was prepared and signed by Louis Wallach and his

wife, Mollie Wallach. Under the deed the property was conveyed to appellant Jack Joseph. Friedman claimed that this was necessary so that he would be in better position to negotiate with the bank that held the loans on the property, and that Jack Joseph would hold the property as straw party for both Louis Wallach and Friedman (Tr. pp. 69, 83, 112, 216, 217, 218).

Additional evidence on behalf of the respondents was to the effect that after paying the past due notes on the property in the amount of approximately $2700.00, Friedman failed and refused to pay the amount due under the second deed of trust or to join in the formation of the corporation to own the property and operate the salvage business, as agreed (Tr. pp. 113, 114, 220, 221). Thereupon, Louis Wallach and Mollie Wallach, his wife, instituted this suit in the St. Louis County Circuit Court on February 13, 1962 (Tr. p. 1).

On March 9, 1962, additional principal and interest notes secured by the first deed of trust on the property became due and were in default. Louis Wallach paid these notes and prevailed upon his brother, respondent Richard Wallach, to pay subsequent notes and thereafter Louis Wallach and his wife Mollie Wallach by quit-claim deed dated November 20, 1962, conveyed all of their interest in the property to respondent Shirley Kash as straw party for Richard Wallach (Tr. pp. 102, 112, 274, 280, Plaintiff's Exhibit No. 20). On September 6, 1963, Shirley Kash and Richard Wallach were permitted by the Court to join as plaintiffs in this action and on the same day filed their Amended Petition. In their Amended Petition they asked for reformation of the documents signed by the

parties in order to make them conform to the true contract between the parties; that the Court find that respondent

Richard Wallach was the owner in fee simple of the real property, and for an accounting between the parties (Tr. pp. 10, 11, 12).

As a defense to the action, Harold Friedman testified that the entire transaction was merely a contract for the sale of the real property to appellants and that this contract was consummated by the execution of a Warranty Deed by Louis Wallach and Mollie Wallach, his wife, to appellant Jack Joseph, and that there was no agreement of any kind between the parties for the formation of a corporation to hold title to the property and operate the salvage business, and to be equally owned by the parties (Tr. pp. 325, 333, 334).

A hearing of the cause began in the Circuit Court on November 19, 1963, and was completed on November 22, 1963. On December 17, 1963, the Court entered an Interlocutory Decree in favor of the respondents. This decree reformed the contract and held that respondent Richard Wallach was the owner in fee simple of the real property, and ordered an accounting between the parties (Tr. p. 477).

On November 6, 1964, there was additional evidence offered in the case with respect to the accounting between the parties, and on March 24, 1965, the Court entered a Final Decree confirming the judgments of the Interlocutory Decree and making a final accounting between the parties (Tr. p. 528).

A Motion for New Trial or Rehearing was filed by the appellants and after it was overruled this appeal was taken.

Points and Authorities.

Point 1.

In reviewing an action in equity, the appellate court must consider and weigh the evidence, make its own findings, and reach its own conclusions, giving due regard to the opportunity of the trial chancellor to judge the credibility of the witnesses.

Gruetzmacher v. Hainey, 373 S. W. 2d 45;
Sebree v. Rosen, 349 S. W. 2d 865;
Taylor v. Taylor, 270 S. W. 2d 806.

Point 2.

The trial chancellor found that respondent Louis Wallach and appellant Harold Friedman entered into an agreement to form a corporation to hold title to the Lucas & Hunt Road property and to operate a salvage business there; that Harold Friedman agreed to make certain payments on the first deed of trust, to pay off a second deed of trust and to contribute $10,000.00 as operating capital; that Friedman failed to make the payments and to cooperate in the formation of a corporation, and because of his failure to carry out his part of the agreement the chancellor restored the parties to their original position. The findings of the chancellor are sustained by the great weight of the evidence and support the Interlocutory and Final Decree.

Hoxey Hotel Co. v. Farm & Home Savings & Loan Ass'n of Wisconsin, 163 S. W. 2d 766, 349 Mo. 880;
Lauffer v. Smith, 85 S. W. 2d 94, 337 Mo. 22;
Sparks v. Sparks, 388 S. W. 2d 508;
Allen v. Smith, 375 S. W. 2d 874.

Point 3.

Equity regards substance and intent rather than form of transaction.

Taylor v. Baldwin et al., 247 S. W. 2d 741, 362 Mo. 1224;
Bates v. Dana, 133 S. W. 2d 326, 345 Mo. 311;
Melvin v. Hoffman, 235 S. W. 107, 290 Mo. 464.

Point 4.

When appellant Harold Friedman did not enter into possession of the Lucas & Hunt Road property and permitted respondent Louis Wallach to remain in possession for a period of two years after the making of the contract between them, and then when certain principal and interest notes secured by a deed of trust on the property became due and he permitted the respondents to pay said notes, knowing of their claim of ownership of said property, he was estopped to deny their ownership or claim that he was the owner of said property.

Emery v. Brown Shoe Co., 287 S. W. 2d 761;
In Re Jamison's Estate, 202 S. W. 2d 879;
Delta Realty Co. v. Hunter, 152 S. W. 2d 45, 347 Mo. 1108.

– 7 –

Argument.

The trial of this case lasted about three days. The chancellor heard at least ten witnesses. There was direct conflict in the evidence and although this court is required to make its own findings and reach its own conclusions it does not have the opportunity to hear and

observe the witnesses as did the trial court. For that reason, this court should defer to the findings of the trial court, particularly since most of the evidence consisted of oral testimony, unless this court finds that the findings of the trial court are against the weight of the evidence.

Gruetzmacher v. Hainey, 373 S. W. 2d 45;
Sebree v. Rosen, 349 S. W. 2d 865;
Taylor v. Taylor, 270 S. W. 2d 806.

We believe that a careful examination of the record will show that the great weight of the evidence is on the side of the respondents and amply supports the conclusions reached by the trial court.

This controversy began when appellant Harold Friedman called on respondent Louis Wallach at his property on Lucas & Hunt Road, where Louis Wallach was conducting a salvage business (Tr. p. 62). Louis Wallach told Friedman of his financial difficulties and as a result these two parties entered into an oral contract (Tr. p. 67). The version of this contract given by Louis Wallach was that Friedman was to pay off about $2700.00 then past due on a first deed of trust on the property, pay off a second deed of trust in the amount of $10,000.00 in full, and then advance another sum of $10,000.00 for working capital (Tr. pp. 65, 66, 68, 69). They further agreed that a corporation would be organized to take title to the property and operate the salvage business, and that Louis Wallach and Harold Friedman would

each own one-half of the capital stock of the corporation (Tr. p. 72).

On the other hand, it was the version of appellant Harold Friedman that the contract was only an agreement

by Louis Wallach to sell to Friedman the Lucas and Hunt property for a consideration of $69,000.00 (Tr. pp. 324, 325, 334, 335). There was expert testimony that the property was worth about $85,000.00 and had a rental value of $450.00 to $550.00 per month (Tr. p. 197).

There seems to be no doubt that Friedman failed and refused to pay the amount due under the second deed of trust or to join in the formation of a corporation to hold title to the real property and operate the salvage business (Tr. pp. 113, 114, 220, 221).

The trial court came to the conclusion that the version presented by Louis Wallach was correct, and entered a decree in favor of the respondents (Tr. pp. 477, 528). The evidence amply sustained this finding. In the first place, Louis Wallach's testimony is corroborated in full by the testimony of William J. Becker, his attorney, who was present and participated when the contract was finally agreed upon (Tr. pp. 202, 209, 234, 238). Furthermore, the actions of Friedman are entirely in conflict with his version of the contract. He relies, of course, on the fact that a Receipt for Earnest Money was signed by Louis Wallach and his wife, Mollie Wallach, which purported to sell him the property for approximately $69,000.00, and that subsequently a Closing Statement and Warranty Deed, dated about March 9, 1961, was signed by Louis Wallach and his wife, Mollie Wallach, conveying the property to appellant Jack Joseph. The testimony of both Louis Wallach and his attorney William J. Becker, however, was to the effect that this method was adopted in carrying out the contract because Friedman stated

that he would be in a better position to negotiate with the bank that held a loan on the property if title was out of Louis Wallach's name, and that Jack Joseph would

hold the property as straw party for both Louis Wallach and Harold Friedman (Tr. pp. 69, 112, 216, 217, 218).

Further corroboration of Louis Wallach's testimony was given by Turuche Lorretz, an employee of Louis Wallach (Tr. pp. 300, 301).

The actions of the appellants after the making of the contract are entirely inconsistent with their position that this was solely a sale of the Lucas & Hunt property. Although the deed was signed about March 9, 1961, Friedman made no effort to go into possession of the property and permitted Louis Wallach to remain in possession of the property until April, 1963, when he went into possession forcibly and changed the locks on the doors (Tr. pp. 109, 110, 111). This was more than a year after Louis Wallach and Mollie Wallach, his wife, instituted this suit in the Circuit Court on February 13, 1962, to quiet title to the property in their names (Tr. p. 1). It would be strange indeed for a man to purchase real property and make no effort to get possession until more than two years afterwards, and more than a year after a suit had been filed to declare him not to have any interest in the property. Furthermore, when notes secured by a first mortgage on the property became due, on March 9, 1962, Friedman showed no interest in the fact that failure to pay these notes would precipitate a foreclosure, and made no effort to see that they were paid. They were paid by Louis Wallach (Tr. p. 103). Later on Louis Wallach, who was without available funds, prevailed upon his brother, Richard Wallach, to pay subsequent notes and conveyed his interest in the property to respondent Shirley Kash as straw party for Richard Wallach (Tr. pp. 103, 104, 105, 112).

Under all these circumstances the trial court was fully justified in reforming the contract, vesting title to the

real property in the name of Richard Wallach, and conducting an accounting between the parties.

Hoxey Hotel Co. v. Farm & Home Savings & Loan Ass'n of Wisconsin, 163 S. W. 2d 766, 349 Mo. 880;
Lauffer v. Smith, 85 S. W. 2d 94, 337 Mo. 22;
Sparks v. Sparks, 388 S. W. 2d 508;
Allen v. Smith, 375 S. W. 2d 874.

An equity court must look through the form and seek the substance and intent so that the true contract may be ascertained.

Taylor v. Baldwin, et al., 247 S. W. 2d 741, 362 Mo. 1224;
Bates v. Dana, 133 S. W. 2d 326, 345 Mo. 311;
Melvin v. Hoffman, 235 S. W. 107, 290 Mo. 464.

By permitting the respondents to remain in possession of the property for over two years and pay the notes secured by the deed of trust on the property when he knew that they claimed ownership of the property and had filed suit to quiet their title, Friedman should be estopped from denying their ownership or claiming that he was the owner.

Emery v. Brown Shoe Co., 287 S. W. 2d 761;
In Re Jamison's Estate, 202 S. W. 2d 879;
Delta Realty Co. v. Hunter, 152 S. W. 2d 45, 347 Mo. 1108.

By the decree of the Court Friedman was reimbursed for all sums that he had advanced and the parties were placed in the same position they were in before they entered into the original contract. Although the appellants have made no direct or specific charge against the ac-

counting as conducted by the court, they have asserted that the court should not have charged Friedman with

rent and deprived the appellants of a right to appeal. There is no merit in either of these contentions. No rental was charged against Friedman until after he was found by the court to have occupied the property without warrant of law and continued to occupy the property and operate a business thereon after the case was decided against him and he was ordered by the court to remove from the premises (Tr. pp. 483, 484, 530, 531). He had a right to appeal from any finding, order or decree of the court after the entry of the Final Decree, and in fact he has done so.

This agreement between the parties was entered into in a rather loose and unorthodox manner; nevertheless there is no doubt that under the overwhelming weight of the evidence the contract that was agreed upon was the one described by Louis Wallach and his attorney, William J. Becker. Friedman offered no one to support his testimony, although he was represented by an attorney, Leroy Kopolow, and testified that at the first meeting with Louis Wallach, the Mayor of Wellston was with him (Tr. pp. 27, 218, 219, 346, 347, 348, 357). Friedman did not place either of these gentlemen upon the witness stand (Tr.—Index pp. ii-v).

It is respectfully submitted that the decree of the trial chancellor is supported by the overwhelming weight of the evidence, and is based upon sound equitable principles of fairness and justice, and should be affirmed.

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St. Louis, Missouri 63101,
Attorneys for Respondents.

APPENDIX "H".

Appellant's Reply Brief in the Supreme Court of Missouri.

In the
Supreme Court of Missouri.

January Call 1967.

Louis Wallach, Mollie Wallach, His Wife, Shirley Kash and Richard Wallach, Plaintiffs-Respondents,	No. 245,269. (St. Louis County.)
v.	No. 51,513. (Supreme Court of Missouri.)
Jack Joseph and Harold Friedman, Defendants-Appellants.	

On Appeal to the Supreme Court of Missouri
From the Circuit Court of St. Louis County,
Division No. 1.

Honorable George E. Schaaf, Judge.

Appellant's Reply Brief.

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Respondents' brief no where refers to our brief or by inference or comment negates anything in it. It is written as if the respondents were an appellant, trying to show this Court what happened below, when it never happened.

Misstated Facts.

1. On Page 2 of the brief, respondents state there was an oral contract to operate together but the record shows this was a real estate purchase only because Mr. Friedman clearly testified (Tr. p. 368) that he wanted no part of Wallach's business because he would not assume Wallach's debts under the Bulk Sales Law. He bought cer-

tain equipment assets together with the real property (Tr. p. 381; our brief, p. 18).

2. On pages 2 and 3 of Respondents' brief, they talk much of working agreements when their own attorney testified the closing was a normal sale (Tr. p. 241).

3. On page 3 of respondents' brief, it may be true that Mr. Friedman failed to make some payments on the deed of trust; but, of course, he refused to join in the formation of a corporation he never agreed to. Mr. Friedman testified that he was to get the rent from Lotus Towing Co., and Mr. Wallach was to pay the notes in lieu of rent (Tr. p. 403), and this ties in with respondents' absurd argument Point 4, p. 6, that Mr. Friedman did not enter into possession. Possession was evidenced by Mr. Wallach's agreement to pay notes in lieu of rent, by Mr. Friedman collecting rent from Lotus Towing Co., and by Mr. Friedman spending $15,629.64 on down payment and improvements (Our prior brief, p. 38), and by Mr. and Mrs. Wallach vacating their home and the business premises in question (Tr. p. 468), retaining only desk space (Tr. p. 335 and 336).

4. The statement on pages 3 and 4 about Louis Wallach and Richard Wallach paying notes proves nothing but the payment of notes in lieu of rentals.

5. The record proper and Court minutes transmitted to this Court when the appeal was taken will show an entry of September 6th, 1963 (Tr. p. 3) and that "Amended Petition of Plaintiffs Shirley Kash and Richard Wallach" was filed; but **no** Amended Petition was ever filed by Louis and Mollie Wallach; this is sloppy pleading at the best, but the Shirley Kash-Richard Wallach pleading filed September 6th, 1963 should have been captioned an **Intervening Petition**, not an Amended Petition; they were not theretofore in the case; they had nothing theretofore filed that they could amend; and their petition fails to state an

intervenor's cause of action and is no basis for the purported and void decree *nisi* based wholly thereon and ignoring the original petition (still in effect), never withdrawn, and the only basis for a decree. Since the evidence clearly showed a sale and did not support a decree under the **original** petition, no relief lies under an intervention by one who loaned money to the plaintiffs, who had no dealings with defendants, and who took a quit claim deed in lieu of a third deed of trust with actual knowledge of the pendency of this case as well as the notice provided by the lis pendens; see Plaintiffs' Exhibits 33 and 36, and Lis Pendens in our prior brief.

6. The Respondents' page 4 outline of Appellants' defense is rather weak. We have stated our defense in our brief in chief and not a word of it is contradicted in Respondents' brief.

7. The Respondents' Point I on page 5 states general law but does not answer any of the reasons we give why this Court should **not** defer to the Chancellor herein.

8. Point 2 of the brief, p. 5, also is answered fully by these observations, that the plaintiffs' petition does not plead partnership or corporate practice and the interlocutory decree (Tr. p. 478) makes findings based on an intervening petition that overlooks the fact that the purchase was a "normal transaction" in the words of William J. Becker, learned counsel for the original plaintiffs (Tr. p. 241); see also, Mr. Friedman's testimony (Tr. p. 368), "a simple land purchase"; and the testimony of plaintiffs' own witness, Mr. Lorretz (Tr. p. 301), that the $10,000.00 was to pick up a second deed of trust; under the law, an executory promise is not fraud and if Mr. Friedman chose not to pick up the deed of trust it was his own business.

9. The Respondents' Argument is as fallacious as their statement and points relied on; the so-called great weight

of the evidence favored appellants; the transaction was a normal sale; the earnest money contract, deed and other documents were drawn by respondents' learned counsel in the individual name of appellants and **not** as trustees for a corporation or partnership; the conclusion of the trial court on intervention was wrong; Mr. Friedman did go into possession by making improvements, adding a new building, collecting rents, and moving his new tenant into Louis Wallach's home, and the Equity Court looking through the form of Respondents' tetsimony must seek the substance and true intent of the documents, the only clear, cogent evidence in the case, Exhibits 14, 15 and 21 as we set out on page 37 of our brief in chief. The agreement was not "loose and unorthodox" (Resp. brief p. 11) but was in clear, cogent and convincing documents in said exhibits and judgment to the contrary should be reversed.

Respectfully submitted,

David K. Breed,

Attorney for Defendants-Appellants.